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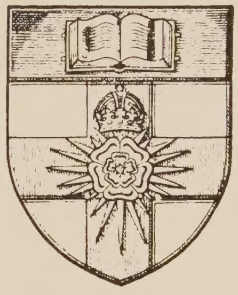

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234	footnote (3)		

269 headnote: line 19:
delete "Calculated down to the date of payment."
line 21:
delete "the interest claimed"; and substitute "interest at the rate claimed."

270 line 25:
delete "Calculated to the date of payment."

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EARL OF ELLESMERE *v.* WALLACE.

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CLAUSON J.
July 18, 19, 31.
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1929
Feb. 5.

[1928. E. 695.]

Gaming—Contract—Horse Race—Sweepstakes—Entrance Fee—Forfeiture in Event of Horse not running—Action to recover—Wagering Contract—Gaming Act, 1845 (8 *&* 9 *Vict. c.* 109), *s.* 18.

At the invitation of the Jockey Club, which was issued subject to the Club's Rules of Racing, the defendant nominated a horse for two races—namely, (1.) the Peel Handicap, described as a sweepstakes for 5 sovereigns, of which 2 sovereigns to be forfeit, with 200 sovereigns added money, second to receive 30 sovereigns of the stakes, 15 entries or race to be at the option of the stewards, and (2.) a long course Selling Plate of 200 sovereigns, entrance 2 sovereigns, 10 entries, or the race to be at the option of the stewards, winner to be sold by auction for 300 sovereigns. The horse did not run in either race. In an action by E. on behalf of himself and the other members of the Club, the trustees of the Club and W. & Sons as stakeholders, to enforce payment by the defendant of the entrance fees or the part of them agreed to be forfeited :—

Held, by Clauson J., first, that both the contracts were made between the Club and the defendant, neither of them being contracts between the several entrants inter se, to contribute stakes to abide an event (notwithstanding that the Peel Handicap was described as a sweepstakes); secondly, that the transaction was a subscription towards a prize or sum of money to be awarded to the winner of a lawful sport; but, owing to the fact that on the face of each contract it was a contract under

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which each of the parties staked something of value upon the issue of an uncertain event, it was a contract by way of wagering within s. 18 of the Gaming Act, 1845, and, consequently, upon the principle of *Diggle* v. *Higgs* (1877) 2 Ex. D. 422 it was void.

Held, further, that the Court could not inquire into the consideration moving from either of the parties beyond his interest in the stakes, nor into the motives (e.g., the encouragement of sport or the breed of horses) for the purpose of contradicting the unenforceable character of the contracts which on the face of the written documents were contracts by way of wagering.

On appeal:—

Held (reversing the decision of Clauson J.), that the contracts for the two races, which were between the Club and the defendant, and not between the various entrants inter se, were in neither case by way of gaming or wagering within s. 18 of the Gaming Act, 1845, and (Lawrence L.J. dissenting as to the case of the Peel Handicap) that the Club were entitled to recover from the defendant the amount of the fees agreed to be forfeited in the two races.

Held, by Lawrence L.J., that the Peel Handicap was a game played for stakes hazarded by the players involving an agreement between the players inter se that their stakes (which were to be deposited with the plaintiffs W. & Sons as stakeholders) should be transferred to the winner: that such an agreement was a gaming contract as between the players, and therefore void under s. 18 of the Gaming Act, 1845; that the plaintiffs W. & Sons, as the potential stakeholders, could not recover the stakes agreed to be contributed by the players; that if on the other hand the effect of the agreement was to constitute the plaintiffs W. & Sons or the Jockey Club agents or trustees for the winner they would thereby have become parties to the gaming contract between the players, and s. 18 of the Gaming Act, 1845, would afford a good defence to any claim made by them as such agents or trustees; and, lastly, that the 2*l*. forfeit, being in the nature of damages for the non-performance of an unenforceable contract, stood in no better position than the full stake of 5*l*.

Per Russell L.J.: There cannot be more than two parties or two sides to a bet. There may be a multipartite agreement to contribute to a sweepstakes, which may be illegal as a lottery, if the winner is determined by chance, but not if the winner is determined by skill.

ACTION.

The Jockey Club, an association of persons interested in the sport of horse racing, framed and published Rules of Racing according to which all race meetings held under the Club's sanction were conducted. Entries of horses for races at such race meetings were lodged at their registry office, and information as to race meetings, entries for races thereat, etc., was given in the Racing Calendar, which was printed and published under the authority of the Club by Messrs.

Weatherby & Sons, who also were the authorized stakeholders to whom entrance moneys and forfeits in connection with the race meetings were payable.

In the issue of the Racing Calendar of April 12, 1928, Messrs. Weatherby & Sons published a notice of the First Spring Meeting for 1928 at Newmarket, a race meeting held under the sanction of the Jockey Club which, so far as material, was as follows :—

"Newmarket First Spring Meeting, 1928.

"Nominations can only be made and accepted on the condition that the nominator subjects himself, in all respects, to the Rules of Racing.

"The following will close by 10 P.M. on Tuesday next, Apr. 17, to Messrs. Weatherby & Sons, at the Registry Office of the Jockey Club, 15, Cavendish Square, London, W. 1.

"Third Day, Thursday, May 3.

"The Peel Handicap; a Sweepstakes of 5 sovs. each, 2 forfeits, with 200 sovs. added; second to receive 30 sovs. out of the stakes; for 3 year old and upwards; the lowest weight to be not less than 7 stone; a winner, after the publication of the weights (Apr. 26, at noon), to carry 10 lbs. extra: Peel Course, 6 furlongs; 15 entries, or the race to be at the option of the Stewards."

"Third Day, Thursday, May 3.

"A Long Course Selling Plate of 200 sovs., for three year old, 7 stone 8 lbs., four, 9 stone, five and upwards, 9 stone 4 lbs.; mares and geldings allowed 3 lbs.; the winner to be sold by auction for 300 sovs., if entered to be sold for 100 sovs. allowed 7 lbs.; a winner of a race of a mile or upwards to carry 7 lbs., of a race of such distance in 1928 10 lbs. extra; entrance 2 sovs.; last mile and a half of Cesarewitch Course. Ten entries, or the race to be at the option of the Stewards."

It was not disputed that the effect of the advertisement of the Peel Handicap was that the nominator of a horse agreed to pay 5*l.* if the horse started and 2*l.* only if the horse did not start.

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By letter dated April 10, 1928, the defendant, in acceptance of the offer so made by the Club through Messrs. Weatherby & Sons, in the issue of the Racing Calendar, nominated a horse named "Master Michael" for those two races.

Master Michael did not run in either of those races which were held by the Club, and the sum of 2*l.* in respect of each race, not having been paid by the defendant to Messrs. Weatherby & Sons, accordingly became forfeit and payable by the defendant. By letter dated May 7, 1928, Messrs. Weatherby & Sons demanded payment by the defendant of those two sums of 2*l.*, but the defendant by letter dated May 9, 1928, refused (in breach of his contract, as the plaintiffs alleged) to pay those sums or either of them. As a result of such refusal this action (which was a test action) was brought by the Earl of Ellesmere (the senior steward of the Club) on behalf of himself and the other members; the trustees of the Club and Messrs. Weatherby & Sons, who conducted the registry office of the Club and received the entrance fees, being joined as co-plaintiffs, in which action the plaintiffs claimed a declaration that the defendant was liable to pay, as forfeits, 2*l.*, the portion of the entrance fee for the Peel Handicap made forfeitable, and 2*l.*, the whole of the entrance fee for the Selling Plate race.

The main defence to the action was that if there were a contract between the defendant and the plaintiffs or any of them which was on the pleadings denied, such contract was by way of gaming or wagering and void and unenforceable within s. 18 of the Gaming Act, 1845. (1)

It was not disputed that the contracts made by nominating a horse were, so far as the plaintiffs or any of them were

(1) Gaming Act, 1845, s. 18: "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

parties to them, contracts with the Jockey Club, and that the other plaintiffs between them could properly be treated as the Jockey Club for that purpose.

The relevant rules of the Rules of Racing, subject to which the defendant nominated his horse, were the following:—

Rule 1. "'Added money' is money actually contributed towards the stakes by the Race-fund or from other sources, as distinct from money contributed by the owners of horses engaged.

"A 'plate' is a race for which a prize or prizes of definite value are guaranteed by the Race-fund, the entrance fee, forfeit, subscription or other contribution of owners going to the Race-fund (subject to the provision of Rule 159, as to disposal of surplus).

"A 'sweepstakes' is a race in which the entrance fee, forfeit, subscription or other contribution of three or more owners go to the winner or placed horses, and any such race is still a sweepstakes when money or other prize is added."

Rule 29. "The stakeholders shall at the expiration of fifteen days after the Meeting render an account and pay over all stakes and added money to the persons entitled."

Rule 56. "In all selling races the winner shall be offered for sale by auction immediately after the race, and the surplus over the selling price shall be divided between the owner of the second horse and the Race-fund."

Rule 86. "Subscriptions and all entries or rights of entry under them become void on the death of the subscriber. . . . ."

Rule 105. "Entrance money, forfeits, stakes, and arrears must be paid in cash (if so required) to the Clerk of the Course or authorised stakeholder, and entrance money must (if so required) be paid at the time of entry."

Rule 106. "Entrance money shall go to the Race-fund of the Meeting, unless otherwise specified in the conditions of the race, and subject to the application of surplus under Part XXII."

Rule 108. "The nominator is liable . . . . for the entrance money, stake or forfeit. . . . . A subscriber to a sweepstakes is liable for the stake or forfeit. . . . ."

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Rule 154. "The full amount of all added money advertised by any meeting to be given in prizes must be paid to the stakeholders within three days of the conclusion of the meeting."

Rule 155. "(i) Prizes, stakes, and forfeits in a race belong to the winner, except as otherwise declared in the conditions. (ii) The value of prizes not in money must be advertised."

Rule 159. "Should there be any surplus from entrance or subscription over the advertised value of the plate, it shall be divided in the following proportions, viz., one-half of the whole surplus shall go to the Bentinck Benevolent Fund, or Rous Memorial Fund, and of the other half two-thirds shall be paid to the second, and one-third to the third. If the winner has walked over, or if no horse has been placed second or third, the proportion of the surplus allotted by this rule to the second or third horse shall also go to the Bentinck Benevolent Fund or Rous Memorial Fund."

The action was tried before Clauson J. on July 18 and 19, 1928.

Hon. Geoffrey Lawrence K.C. and *Theobald Mathew* for the plaintiffs.

Archer K.C. and *H. M. Giveen* for the defendant.

Cur. adv. vult.

1928. July 31. The following written judgment was delivered by

CLAUSON J. In April, 1928, public announcement was made of two races to be run at the Newmarket First Spring Meeting, 1928, namely: (1.) the Peel Handicap described as a sweepstakes of 5 sovereigns each, of which 2 sovereigns to be forfeit with 200 sovereigns added money, second to receive 30 sovereigns out of the stakes; fifteen entries or the race to be at the option of the stewards; and (2.) a Long Course Selling Plate of 200 sovereigns, entrance 2 sovereigns; ten entries or the race to be at the option of the stewards; winner to be sold by auction for 300 sovereigns. For these races nominations were invited, subject to the Rules of Racing. The

defendant nominated a horse for each race, but when the time came the horse did not run. The defendant did not pay any part of the entrance fee for either race. The plaintiffs claim 2 sovereigns in respect of the nomination for the Peel Handicap (being the portion of the entrance fee made forfeitable) and 2 sovereigns in respect of the nomination for the Long Course Selling Plate, being the total entrance fee.

The plaintiff, Lord Ellesmere, is the senior steward of and sues on behalf of the members of the Jockey Club. The Jockey Club conducts the Newmarket Spring Meeting. The three next plaintiffs are the trustees of the Club. The plaintiffs, Weatherby & Sons, conduct the registry office of the Club and under the Rules of Racing entrance fees are to be paid to them. On the pleadings questions were raised as to the party entitled to sue for the 4*l.*; but these possible questions were not argued before me. It was treated before me—and in my opinion correctly—that the contract made by nominating the horse was a contract, so far as the plaintiffs or any of them were parties to it, with the Jockey Club, and that the plaintiffs between them could properly be treated as the Jockey Club for this purpose.

I need not travel in detail through the Rules of Racing. It will suffice to say that I hold that the effect of the defendant's nomination of a horse for each of the two races in question (subject to the operation and effect, if any, of s. 18 of the Gaming Act, 1845) was to constitute two contracts between him and the Jockey Club the salient features of which may, without condescending upon unnecessary detail, be stated as follows. First, as regards the Peel Handicap, the defendant agreed to pay an entrance fee of 2*l.* with a further 3*l.* if the horse ran; the Jockey Club agreed, if fifteen entries were received, to provide for holding the race and to pay to the defendant, if his horse won, a prize of 200 sovereigns in addition to a sum equal to the amount of the entrance fees less 30 sovereigns, or, if his horse was second, 30 sovereigns out of the entrance fees: and, secondly, as regards the Selling Plate, the defendant agreed to pay an entrance fee of 2 sovereigns; the Club agreed, if ten entries were received, to provide for

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holding the race, and to pay to the defendant, if his horse won, a prize of 200 sovereigns; if the defendant's horse won, the Club was to sell him by auction at a reserve of 300 sovereigns, any sum realized in excess of the 300 sovereigns to be divided between the owner of the second horse and the race fund, that is, the Club (see rule 56). So far I did not understand there to be any dispute between the parties.

I pass over for the moment a question, to which I shall return later, as to the legal relations, if any, between the defendant and other entrants to the races, and I likewise defer any comment on the use of the word "sweepstakes" in relation to the Peel Handicap.

It was not disputed that, subject to the operation and effect, if any, of s. 18 of the Gaming Act, 1845, the two contracts which I have summarized were valid and binding as between the Club and the defendant and enforceable in this action. Mr. Lawrence, for the Club, in an interesting historical argument, the accuracy of which was not impugned by counsel for the defendant, pointed out that while, first, horse racing is at common law a lawful sport, secondly, certain statutes operated to restrict certain forms of and contracts relating to horse racing (see 16 Car. 2, c. 7; 9 Anne, c. 14; 13 Geo. 2, c. 19; 18 Geo. 2, c. 34; 3 & 4 Vict. c. 5), the repeals effected by the Gaming Act of 1845, operated to sweep away preceding statutory restrictions and to leave horse racing as a lawful sport and to leave contracts relating thereto to operate according to their tenor and the general law of contract subject only to the operation and effect, if any, of s. 18 of the Gaming Act, 1845. In the course of his argument Mr. Lawrence cited *Marryat* v. *Broderick* (1); *Evans* v. *Pratt* (2); *Goldsmith* v. *Martin* (3); *Applegarth* v. *Colley* (4); *Bentinck* v. *Connop* (5); and *Brown* v. *Overbury*. (6) As however the correctness of his submissions on this part of the case was not impugned by counsel for the defendant, it is unnecessary for me to travel through those authorities or to say more than that I

(1) (1837) 2 M. & W. 369.
(2) (1842) 3 Man. & Gr. 759.
(3) (1842) 4 Man. & Gr. 5.
(4) (1842) 10 M. & W. 723.
(5) (1844) 5 Q. B. 693.
(6) (1856) 11 Ex. 715.

see no reason to doubt that Mr. Lawrence's argument stated the law correctly. This case accordingly turns on the application to the facts of the case of s. 18 of the Gaming Act, 1845. That section is as follows: "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." The first point made on the section for the plaintiffs was that the transaction between the defendant and the Club in respect of each race being "a subscription or agreement to subscribe to a prize to be awarded to the winner of a lawful sport" (as indeed in my opinion it clearly is) the proviso exempted the two contracts between the Club and the defendant from the operation of the section altogether, and left them perfectly valid and enforceable contracts, even though they are or may be contracts by way of gaming or wagering. This construction of the section was in the year 1848 adopted, though with some hesitation, by Truro L.C. (then Chief Justice of the Common Pleas) and Coltman, Cresswell and Williams JJ. sitting in banc in the Court of Common Pleas in *Batty* v. *Marriott*. (1) There is, however, an alternative construction of the section—namely, that the proviso merely applies to such subscriptions or agreements to subscribe as are not contracts by way of wagering. This construction was expressly adopted by the Court of Appeal, consisting of Cairns L.C., Cockburn C.J. and Bramwell L.J., in *Diggle* v. *Higgs* (2), and the Privy Council in *Trimble* v. *Hill* (3) stated that *Diggle* v. *Higgs* (2) had "settled the vexed

(1) (1848) 5 C. B. 818. (2) 2 Ex. D. 422.
(3) (1879) 5 App. Cas. 342, 345.

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question of the construction of a not very intelligible enactment." As a judge of first instance I ought not, I conceive, even to discuss a statement of the law delivered in the Court of Appeal fifty-one years ago and stated by the Privy Council forty-nine years ago to have settled a previously vexed question. Accordingly, the plaintiffs must fail before me on their first point and I must undertake the task of determining whether or not the contracts with which I have to deal are "contracts by way of gaming or wagering." If they are, I must hold them null and void by reason of the first sentence of s. 18.

I must now return to a point to which I have already alluded. As I have stated the contracts, they are in each case contracts between the Club and the defendant, to which there is no other party, and the argument for the Club is that that is a correct view of the contracts. I am not sure that Mr. Archer for the defendant disputed this; but however that may be, it may be well that I should express my opinion that the contracts are merely contracts between the Club and the defendant, and that no contract in suit before me is a contract between the various entrants inter se to contribute stakes which are to abide an event. It is true that the Peel Handicap is described in the public announcement as a sweepstakes and that a sweepstakes is the term commonly used to describe the contract entered into by several competitors who agree with one another to put up stakes to abide the event of the competition. The term "sweepstakes" appears to be used in connection with the Peel Handicap, because the quantum of the prize varies with the number of the entrance fees contributed, a feature common to this particular race and to a sweepstakes properly so called. But I cannot find on the facts alleged and either admitted or proved before me any contract inter se between the various persons who enter for the two races in question.

Each contract thus being, as I hold, a contract between the Club and the defendant, I have to deal with the question whether it is a contract by way of gaming or wagering. For this purpose I may, I think, treat it as settled that it is essential

to a wagering contract that each party may under it either win or lose, his winning or losing being dependent on the issue of the event (per Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1)). It is clear that the defendant risks the loss of his entrance fee on the issue of the race and that he stands to win in the case of the Peel Handicap a sum equal to the entrance fees of the competitors, less 30 sovereigns, and 200 sovereigns added money, and in the case of the Selling Plate 200 sovereigns. Does the Club stand to lose anything and, if so, what? Obviously in the case of the Peel Handicap the 200 sovereigns added money and in the case of the Selling Plate the 200 sovereigns. What does the Club stand to win? As between the Club and the defendant 5*l.* on the Peel Handicap if the defendant's horse runs and fails to win or be placed, and if the horse fails to run 2*l.*, and on the Selling Plate in the like events 2*l.*

It was strenuously argued for the plaintiff that the Club could in no event win, and this may be the case if the result of all the contracts which the Club enters into in regard to each race is taken into account. But if I am right in the view, which was in fact urged upon me as the correct view by the plaintiffs, that the contracts which the plaintiffs seek to enforce are bipartite and not multipartite contracts, that is, are in fact contracts simply between the Club and the defendant, how am I concerned, for the purposes of considering whether or not both parties stand to win or lose on the two contracts, with the probability or even the certainty that the Club will enter into other contracts with other entrants with the result that it can never be an ultimate gainer? Must I not consider the individual contracts before me and their operation as between the two parties to them? I believe it is not unknown for an individual to arrange a series of bets upon the result of a particular race in such a way that while, as the event turns out, he may win largely or only to a slight extent, he will in no event be left a loser; such a case would be an example of a case in which a series of transactions each of which would be a wagering transaction would, in the

(1) [1892] 2 Q. B. 484, 491.

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aggregate, leave the individual free of risk, and yet it could not, I think, be seriously contended that each separate bet would not be a "contract by way of wagering" as between the parties to it.

A further point urged by the plaintiffs was that in any case the Club could not retain the defendant's entrance fee, even if the event turned against the defendant; that under the Rules of Racing his entrance fee would either find its way to the owner of the winner or of a horse placed second or third, or to certain benevolent objects: see rule 159. That appears to me to be irrelevant. If the entrant fails to secure a win or a place, his rights under the contract seem to me to come to an end. He could not sue the Club for breach of contract, if they chose to deal with his entrance fee otherwise than in accordance with the Rules of Racing; that would be a matter which would and could affect only those who have a claim to the successful entrant's fee under the Rules of Racing. But the truth is that, as between the unsuccessful entrant and the Club, the fee which the entrant risks and loses belongs to the Club, and none the less so because the Club may, as between itself and a successful entrant, be bound by virtue of its contract with the latter entrant, to account to that entrant for the fee or because the Club has declared its intention of devoting the fee or part of the fee so gained to some benevolent object.

I thus come to the conclusion that in the case of each of the contracts in suit the essential element of wagering is present—namely, that each party may under each contract either win or lose, as the event may turn out. That, however, so it is argued, does not necessarily conclude the matter. It was argued (reference being made to the language of Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1), that in the case of each contract the Court is at liberty to inquire into the real consideration for the making of the contract and that the Court can hold that the contract is a contract by way of wagering if, but only if, there is no real consideration for the making of the contract by either party beyond his

(1) [1892] 2 Q. B. 484, 491.

interest in the stake to be won or lost. Now it is quite true that where the terms of the contract appear on the face of them to be legally enforceable, the Court may, at the instance of either party, inquire whether its terms conceal the true contract which is a contract by way of wager: see the authorities to which Hawkins J. refers in his judgment. (1) But where the terms of the contract are to be gathered from written documents—in this case the advertisement of the meeting and the Rules of Racing—and on a perusal of them nothing of substance is to be found in the contract save stipulations as to the bringing about of the event—in the present case the running of the race—and as to the operation of the event by way of gain or loss upon the pecuniary position of the parties, and the Court thus, on the construction of the contract, finds nothing to mitigate the character of the contract as a wagering contract, I do not see what right the Court has to inquire, at the instance of one party, into any circumstances dehors the contract or into the motives of the parties or either of them in search of material to enable a party to contradict the unenforceable character of the contract, as appearing in its terms. At all events, no authority was produced to the effect that the Court has any such right. It was suggested that both contracts might be read as contracts under which, in consideration of the entrance fee, the Club contracted to give the defendant the opportunity (said to be very important for all breeders and owners of race-horses) to exhibit his animal's powers at the Newmarket Spring Meeting and that the prize was a mere subsidiary matter to which an owner would attach no real importance. It was suggested that the contract in regard to the Selling Plate might be fairly read as a contract to give the defendant the chance of having his horse sold under favourable circumstances. I cannot so read the contracts. They appear to me to be nothing more nor less than contracts under which the defendant risks his entrance fee to gain a prize while the Club risks the added money and the prize against the entrance fee. In the case of the Selling Plate the provisions

(1) [1892] 2 Q. B. 484, 492.

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as to auction seem to me to be subsidiary and ancillary to the main feature in the contract.

One further argument on the plaintiff's behalf remains. It was suggested that in fact the real interest of the Club in such contracts as the present is not pecuniary gain, but the encouragement of sport and horse breeding. That may well be so; and the fact that, on the sum total of the contracts with the various entrants, the Club would seem, on the face of it, not to be an ultimate gainer, points in that direction. That argument, however, seems to me to be addressed to the motive which actuates the Club in entering into the contract. It may or may not be that, if there is a question whether a contract, on the face of it enforceable, is obnoxious to the law as being in fact, though not in form, a contract by way of wagering, the motives of the parties in entering into the contract can be regarded: but I do not see how I can take into account the motives of the Club, however excellent, in relation to a contract which I find on the face of it to be a contract by way of wagering.

I may sum up my conclusions very shortly. I am not free, by reason of authorities which bind me, to construe s. 18 of the Gaming Act, 1845, as enacting that the contracts of entrants to such races as those in question are enforceable in the Courts whether they are or are not contracts by way of wagering. I accordingly have to consider whether the contracts between the Jockey Club and the defendant effected by the defendant entering his horse for the Peel Handicap and the Long Course Selling Plate are or are not contracts by way of wagering. I hold that they are contracts by way of wagering, because the contracts on the face of them are arrangements by which each party stakes something of value on the issue of an uncertain event.

The action will accordingly be dismissed, on the ground that it seeks to enforce contracts which, being by way of wagering, are null and void by reason of s. 18 of the Gaming Act, 1845.

H. C. H.

The plaintiffs appealed. The appeal was heard on December 10 and 11, 1928.

Hon. Geoffrey Lawrence K.C. and *Theobald Mathew* for the appellants. The contract made on the entry for a race by which the nominator agrees to pay an entry fee is not void as a gaming transaction within the Gaming Act, 1845, s. 18. The plaintiffs are therefore entitled to recover the whole or such part of the fee as is forfeited upon the nominator failing to run the horse.

The Jockey Club are particularly anxious to obtain a decision on the point owing to the difficulty that arises when a nominator dies before the race is run. In view of the doubt whether the fee was recoverable from his executors, the Rules of Racing at present provide (r. 86) that the entry becomes void. This is undesirable, and these proceedings are in the nature of a test action to ascertain the true position.

In so far as Clauson J. has decided that the contract of entry is made between the entrant or nominator and the Jockey Club, the appellants accept his decision; but the contract is, it is submitted, protected from being void under the Gaming Act, 1845, by the proviso to s. 18. The Jockey Club can in no circumstances take any benefit under the contract, for r. 159 of the Rules of Racing provides that any surplus from entrance fees or subscriptions over the advertised value of a plate is to be divided between two benefit funds and the owners of the second and third horses.

Horse racing is a "lawful sport," so as to come within the proviso to s. 18. At first it was legalized, subject to certain restrictions, in order to discourage gaming on credit: see 16 Car. 2, c. 7; 9 Anne, c. 14; 13 Geo. 2, c. 19; 18 Geo. 2, c. 34, s. 11; and 3 & 4 Vict. c. 5 (which repeated, as regards horse racing, the Act of 13 Geo. 2, c. 19). Finally came the Gaming Act, 1845 (8 & 9 Vict. c. 109), under which horse racing was fully legalized. Further, the words "any plate, prize or sum of money" appeared in some of the earlier Acts: see *Evans* v. *Pratt*. (1)

(1) 3 Man. & Gr. 759.

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The whole difficulty here is caused by *Diggle* v. *Higgs* (1), where it was held that an agreement between two persons to walk a match for 200*l.* a side was a wagering transaction, so that the loser could recover the sum which he had deposited with a stakeholder. That case is however distinguishable. The essence of the transaction was an even wager of 200*l.* It is different where a number of persons put up sums of money which are to provide a prize for the winner. There the Court of Appeal overruled *Batty* v. *Marriott* (2), but that also was a transaction between two persons. The essence of the decision in *Diggle* v. *Higgs* (1) is that a subscription by two persons towards a prize for one of them is merely colourable : see *Crofton* v. *Colgan.* (3) *Diggle* v. *Higgs* (1) was followed in *Trimble* v. *Hill* (4) and applied in *Shoolbred* v. *Roberts* (5), where Phillimore J. appears to have drawn a distinction between cases where the contributions were by the competitors and cases where they were by outsiders.

The contract here has no element of wagering. It is made between the entrants and the Jockey Club. It is bipartite and not multipartite. The best definition of a "wagering" contract is that given by Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (6), where he says : "A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake ; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties."

[LORD HANWORTH M.R. I do not quite see how that proposition is supported by *Thacker* v. *Hardy.* (7)]

Some light is thrown upon what Hawkins J. meant by the statement in Stutfield on the Law relating to Betting, 3rd ed.,

(1) 2 Ex. D. 422.
(2) 5 C. B. 818.
(3) (1859) 10 Ir. C. L. R. 133.
(4) 5 App. Cas. 342.
(5) [1899] 2 Q. B. 560.
(6) [1892] 2 Q. B. 484, 490.
(7) (1878) 4 Q. B. D. 685.

p. 32. It is clear in the present case that the Jockey Club cannot win: see r. 154; and therefore the contract is not a wagering contract. The Club cannot possibly win in the case of a sweepstakes, because the stakes go to the winners. Can it be said that in every tournament in which an entrance fee is paid there is a wagering contract? What does the proviso in s. 18 apply to if it does not apply to a case like the present? Rule 158 throws some light on what is the nature of the entrance fees. They are sums fixed with reference to the value of the plate, and are devoid of any reference to a wager.

As therefore the Jockey Club cannot win, the contract does not contain the element of wagering.

Then as to whether there is any consideration in the contract other than a wagering element, it is submitted that the true consideration is not a wagering consideration, but that the contract is a bona fide business contract between the Club and owner of the horse, the object of the Club being to keep up Newmarket and that of the owner to improve the value of his horse.

There is no reported case which detracts from what was said by Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1): see also *Weddle, Beck & Co.* v. *Hackett.* (2)

Where the consideration is other than mere gaming the case does not fall within s. 18: *Peers* v. *Caldwell.* (3)

[RUSSELL L.J. I do not think that case has much bearing upon the present.]

Our contention still remains that to constitute a wagering contract there must be no consideration other than the wager, and that was clearly not the case here. The consideration moving from the Jockey Club was the provision of a place for holding the race meeting at Newmarket with all the facilities which Newmarket provides. We do not rely on any terms dehors the contract but on the contract itself.

To sum up. On the true construction of the proviso to s. 18 the contracts here are clearly within the proviso.

(1) [1892] 2 Q. B. 484, 490. (2) (1928) 45 Times L. R. 67, 70.
(3) [1916] 1 K. B. 371.

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[RUSSELL L.J. The proviso only applies if you are not within the first part of the section: see *Diggle* v. *Higgs*. (1)]

If the real object of the contract is a wager then the contract is not within the proviso. If the contract is really within the proviso it does not matter if it also contains an element of wagering.

[LORD HANWORTH M.R. referred to *Batson* v. *Newman*. (2)]

Archer K.C. and *H. M. Giveen* for the respondent. The decision of Clauson J. was right. The problem is to set a limit to what is gaming and wagering.

Sect. 18 shows that wagering and contracts by way of wagering were in the mind of the Legislature, and that all contracts by way of gaming or wagering are wrong.

What you have to look at first of all is the nature of the transaction. The contract is merely the machinery for carrying the transaction into effect. Here the Jockey Club is the promoter of betting on a lawful game. Each entrant to a race makes a bet with each of the other entrants. If the element of wagering be present where there are two entrants it is equally present where there are more than two. Each of the entrants to a race stands to lose or win.

A contribution to a prize is a bet if the contributor is himself a competitor: *Diggle* v. *Higgs* (1); see also *Shoolbred* v. *Roberts*. (3)

The idea conveyed by all the statutes dealing with the matter is the changing of the right to money as the result of some sporting event. The event may be quite lawful, but it would nevertheless be gaming.

As to r. 159, a contract is none the less a gaming or wagering contract because one of the parties undertakes some duty or gives his winnings to a benevolent object. The ultimate destination of the money can make no difference in the nature of the winnings.

It is submitted that the transactions in this case are not other than bets. To take the plate race. That is clearly the case of a bet. The entrant pays 5*l*. to enter for the plate, which is

(1) 2 Ex. D. 422. (2) (1876) 1 C. P. D. 573.
(3) [1899] 2 Q. B. 560, 563.

of the value of 200*l*. If he wins he gets 200*l*.; if he loses he loses his 5*l*. The transaction is just as much a bet as if made with a bookmaker.

[LAWRENCE L.J. The case is different. In the present case the entrant has the privilege of entering his horse for the race and the Club provides the accommodation.]

The payments have no reference to the privilege of running a horse over a racecourse.

If a transaction once comes within the ambit of the earlier part of s. 18 the proviso does not apply. The fact that a stakeholder is introduced does not affect the nature of the transaction.

The Hon. Geoffrey Lawrence K.C. in reply. There is no distinction between a contract of wagering and a contract by way of wagering.

The Court cannot speculate as to the motives of the parties but must look at the contract.

All the reported cases in which the transactions have been held to fall within s. 18 have been cases of bets between two persons.

Cur. adv. vult.

1929. Feb. 5. The following written judgments were delivered :—

LORD HANWORTH M.R. This is a test action brought by the senior steward of the Jockey Club on behalf of himself and all other members of the Jockey Club, the trustees of the Jockey Club and Messrs. Weatherby & Sons, a firm who act as registrars and stakeholders for the Jockey Club, against Mr. Edgar Wallace, who is the owner of racehorses. The statement of claim prays a declaration that the defendant is liable to pay two sums of 2*l*. each as forfeits in respect of two races in which the defendant had nominated one of his horses named "Master Michael" to run; and the question to be determined in the action is whether the plaintiffs can recover this total sum of 4*l*. by an action at law. Clauson J. in a considered judgment held that the contracts under which the plaintiffs contend that the liability of the defendant arises are contracts by way of gaming and wagering within s. 18 of the Gaming Act, 1845, and, therefore, null and void.

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There is no dispute about the facts. The two races in question were races advertised to be run at the Newmarket First Spring Meeting, 1928, under the authority of the Jockey Club, for which nominations were invited subject to the Rules of Racing. The first was the Peel Handicap, described as a sweepstakes of 5 sovereigns each, of which 2 sovereigns were to be forfeit, with 200 sovereigns out of the stakes; 15 entries, or the race to be at the option of the stewards of the Jockey Club. The second race was a Long Course Selling Plate of 200 sovereigns—entrance 2 sovereigns; 10 entries, or the race to be at the option of the stewards; the winner to be sold by auction for 300 sovereigns. The defendant nominated a horse for each race, but when the time came for starting the horse did not run. The defendant has not paid any part of the entrance fee for either race. The plaintiffs, therefore, claim in this action to establish a legal liability upon the defendant to pay the sum made forfeitable in the first race—namely, 2*l.*—and likewise 2*l.* payable in respect of his nomination for the second race, which in fact was the total entrance fee for that race. It is not contested that by nominating a horse in each of those two races a contract was made by the defendant with the Jockey Club which incorporated the Rules of Racing, or that the plaintiffs are the right persons to sue upon these contracts. It is, however, necessary to recall the statement of the terms of the contracts made by Clauson J. as follows: "First as regards the Peel Handicap, the defendant agreed to pay an entrance fee of 2*l.* with a further 3*l.* if the horse ran; the Jockey Club agreed if 15 entries were received to provide for holding the race, and to pay to the defendant, if his horse won, a prize of 200 sovereigns in addition to a sum equal to the amount of the entrance fees less 30 sovereigns; or, if his horse was second, 30 sovereigns out of the entrance fees; secondly, as regards the Selling Plate, the defendant agreed to pay an entrance fee of 2 sovereigns; the Club agreed, if 10 entries were received, to provide for holding the race and to pay to the defendant, if his horse won, a prize of 200 sovereigns; if the defendant's horse won, the Club was

to sell him by auction at a reserve of 300 sovereigns, any sum realised in excess of the 300 sovereigns to be divided between the owner of the second horse and the race fund, that is the Club (see r. 56)." Now there is one feature in this statement which in my judgment oversteps the mark. It is not right to say that the Club agreed in each race to pay to the defendant if his horse won a prize of 200 sovereigns. The Club agreed to provide and pay away 200*l.* if the race was run at all and upon any result of the race. The Club lose 200 sovereigns, not as against the defendant or upon any event to be determined with the defendant. Clauson J. asks the question, "Does the Club stand to lose anything, and if so, what?" and answers it: "Obviously in the case of the Peel Handicap the 200 sovereigns added money and in the case of the Selling Plate 200 sovereigns." This is too wide an inference to be drawn from the contracts between the Club and the defendant. The Club loses once and for all, if either of the races are run, 200*l.* Whether the defendant's horse won or another of those nominated was an eventuality of no importance to the Club. The Club agreed to provide for holding the races and to pay to the winner 200*l.* There was no direct alternative provided as between the Club and the defendant, that in one event the defendant should lose his 5*l.* or 2*l.*, as the case might be, or in the other win 200*l.* The competition of the other horses must not be left out of account in stating the terms agreed upon. The Club provided for holding the two races, in which the defendant had the opportunity of running his horse and the chance among 14 others in the first race and among 9 others in the second race of winning 200*l.* The definitions of a "plate" and of a "sweepstakes" in the Rules of Racing make it plain that this correction of the judge's statement of the contracts must be made.

It is unnecessary to refer in greater detail to the Rules of Racing, though I may say in passing that I do not think that the ultimate destination of any surplus from entrance fees or subscriptions to the benevolent funds mentioned in r. 159 has any bearing upon the nature of the contracts now

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under consideration, whether in favour of or against them, or upon the question whether the contracts are rendered null and void under the section of the Gaming Act: see per Lord Reading in *Welton* v. *Ruffles*. (1) It is, however, of importance to observe that it is found to be a term of the contract that the Club should provide for the holding of the race, subject only to a term in each case as to the number of entrants. The importance of an additional element to a contract which is claimed to be a gaming contract is pointed out by Sankey J. in *Welton* v. *Ruffles* (2), where refreshments were provided under the contract for all those who came upon the premises to play the game. Such an element negatives the inference that the only object or aim in the contract was to win money or money's worth.

Horse racing, in spite of restrictions placed upon it from time to time, remains a lawful sport. The Gaming Act of 1845 is interesting from the history recalled in its preamble and in the several Acts which are repealed in whole or in part by s. 15; but s. 18 is the one which is relevant to this case. Its terms are: "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." It is tempting to say that the sums in question in the present action fall within this proviso, as they would appear to do. Indeed in *Batty* v. *Marriott* (3) it was decided in 1848 that a deposit with a stakeholder of 10*l.* a side by two persons who agreed to run a lawful foot-race, the winner to receive the 20*l.*, fell

(1) [1920] 1 K. B. 226, 229. (2) [1920] 1 K. B. 233.
(3) 5 C. B. 818, 829.

within the proviso, and not within the enacting part of the section. In his judgment it is to be noted that Wilde C.J. (as he then was) said this: "Horse-racing was not meant to be put down; yet, if two persons only run their horses one against the other, for a sum of money, that is clearly a wager." This case was, however, definitely overruled by *Diggle* v. *Higgs*. (1) There the action was brought to recover the deposit made by one party who had agreed to walk a match with the other party for 200*l*. a side. Lord Cairns (2) read the proviso thus: "Provided that so long as there is a subscription which is not a wager the second part of the section ['no suit shall be brought or maintained in any Court of law or equity for recovering' etc.] shall not apply to it." And he adds: "I therefore think that although there was a deposit of money, the contract in this case was a wager, and that all the consequences which are imposed by s. 18 on contracts by way of wagering follow." Cockburn C.J. said (3): "In my opinion that proviso was intended to meet the case of bonâ fide contributions to a prize to be given to the winner in some lawful competition, but not to money deposited by way of wager." Bramwell L.J. agreed. That case is binding upon this Court. It was approved in *Trimble* v. *Hill* (4); and it is not possible to read the proviso otherwise than as stated in the two excerpts that I have made. Thus the question must be determined whether these contracts made with the defendant were "by way of gaming or wagering."

Now in all the cases referred to, *Daintree* v. *Hutchinson* (5); *Batty* v. *Marriott* (6); *Batson* v. *Newman* (7); *Diggle* v. *Higgs* (1); *Trimble* v. *Hill* (4); *Shoolbred* v. *Roberts* (8); and *Martin* v. *Hewson* (9), the deposit or wager was between two persons for the purpose of a match, and the words I have quoted from the judgment of Wilde C.J. refer to a match also where two persons run their horses one against the other. There is a clear distinction between all those cases and the

(1) 2 Ex. D. 422.
(2) Ibid. 426.
(3) Ibid. 428.
(4) 5 App. Cas. 342.
(5) (1842) 10 Mee. & W. 85.
(6) 5 C. B. 818.
(7) 1 C. P. D. 573.
(8) [1899] 2 Q. B. 560, 564.
(9) (1855) 10 Ex. 737.

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dicta referred to and the present. I turn, therefore, to the consideration by Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1) as to whether the contract before him was a contract by way of gaming or wagering within the statute. The passage quoted was approved by the Court of Appeal. (2) It is as follows (3): "It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties." There is no doubt that the terms of this definition were carefully chosen. The latter part of it, as to neither of the contracting parties having any other interest in the contract than the stake, is of great importance. It is a qualification that accords with the words used by Grose J. in *Good* v. *Elliott* (4), where he speaks of wagers as illegal under the statutes then in force: "where the party has no other interest in the subject matter of them than that which he chooses to create by his bet," and the qualification is necessary to exclude policies of insurance.

Whether the word "interest" is sufficient to cover what is intended to be expressed is doubtful. A contract of insurance as between insured and insurer may be expressed in terms of a wager. On the other hand a wager may be concealed in the terms of a contract with a condition as to quality, as in *Brogden* v. *Marriott.* (5) In that case there was an agreement for the purchase of a horse for 200*l.* if he trotted 18 miles an hour or for 1s. if he failed, and Tindal C.J.

(1) [1892] 2 Q. B. 484.
(2) [1893] 1 Q. B. 256, 261.
(3) [1892] 2 Q. B. 484, 490.
(4) (1790) 3 Term Rep. 693, 694.
(5) (1836) 3 Bing. N. C. 88.

rejected the pretended reality of the condition, looked at the substance of the matter, and held the seeming contract to be a wager.

It is clear from other like cases that the substance of the matter is to be regarded; and if so, it may be more accurate to say that if there is no other purpose in the contract than that of gaming or wagering, it is void—the interest of the parties being evidence of the purpose for which it is entered into.

But whether "interest" or "purpose" be the right term, *Thacker* v. *Hardy* (1) affords an illustration of the importance of this qualification. The broker who sued the defendant in respect of contracts made on the latter's behalf with jobbers on the Stock Exchange had quite a different interest and purpose from that of the defendant, who expected merely to pay differences. Bramwell L.J. there says (2): "There is no gaming or wagering in a transaction of that kind: the broker has no interest in the stock, and it does not matter to him whether the market rises or falls." He then adds the significant observation: "When a transaction comes within the statute against gaming and wagering, the result of it does affect both parties"; and he distinguished the case of Thacker, the broker, from that of *Grizewood* v. *Blane* (3), where it was found by the verdict of the jury that the plaintiff and defendant were gambling direct with each other, and contracts for the purchase and sale of stocks were devices, used colourably, in the course of their gambling.

Again in *Thacker* v. *Hardy* (4) Cotton L.J. says: "The essence of gaming and wagering is that one party is to win and the other party to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win."

That definition was cited with approval by Lord Herschell in the judgment of the Privy Council in *Forget* v. *Ostigny* (5),

(1) 4 Q. B. D. 685.
(2) Ibid. 692.
(3) (1851) 11 C. B. 526, 538.
(4) 4 Q. B. D. 685, 695.
(5) [1895] A. C. 318, 326.

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and was adopted by Sir W. Anson as indicating the essential nature of a wagering contract. Sir William's own definition is: "A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either something given by the other party to abide the event, or a promise to give upon the event determining in a particular way": Anson on Contract, 15th ed., pp. 230, 231, 232. He adds: "There must therefore be mutual chances of gain and loss"; and "the parties must contemplate the determination of the uncertain event as the sole condition of their contract." Sir W. Anson concludes that in essence, there is no difference between insurance contracts with an insurable interest, and a wager; and that it is the fact that one wagering contract is, and the other is not, permitted by law which makes the distinction between the two.

Now to apply the definition of Hawkins J., and the reasoning, above stated, to the facts of the present case.

Clauson J. does not find, nor do I find, any contract, inter se, between the various persons who nominate horses for entry in either of the two cases in question; and indeed the question to be decided in this action depends upon the contract between the Club and the defendant. Clauson J. goes on to state his view of the situation created by this contract—that is, that the defendant risks the loss of his entrance money on the issue of the race, and that he stands to win in the case of the Peel Handicap a sum equal to the entrance fees of the competitors, less 30 sovereigns, and 200 sovereigns added money. He proceeds in the passage already referred to: "Does the Club stand to lose anything, and if so, what? Obviously in the case of the Peel Handicap the 200 sovereigns added money, and in the case of the Selling Plate the 200 sovereigns. What does the Club stand to win? As between the Club and the defendant 5*l.* on the Peel Handicap if the defendant's horse runs and fails to win or be placed; and if the horse fails to run 2*l.*; and on the Selling Plate in the like events 2*l.*" I cannot accept this statement. The Club "loses"—to use his term—200*l.* if either race is run

at all, and that "loss" does not depend upon the issue of a future event between the Club and the defendant. It is paid away, not lost, in any event. To whom 200*l.* shall be paid depends upon the issue between the running of the horses of the other entrants and of the defendant. The only event outstanding between the defendant and the Club is whether the defendant's horse will run in the races or not, and that depends not upon the determination of any future event, but solely upon the volition of the defendant.

In my judgment the interest of the two parties is not the same. Each of them has interests in the contract other than the sum that will be won or lost when the race is decided. The defendant secures the rights to nominate his horse for two races on Newmarket Heath, together with rights or chances which he shares with others who nominate horses to run in the races. The plaintiffs get a payment from the defendant of 2*l.* in each race, and in the first race for the handicap, that sum may be increased accordingly as the defendant at his own will exercises his option to run his horse in the race or not to do so. There is another consideration present in these contracts besides the so called stake—namely, the undertaking by the Club to provide facilities for the holding of both races.

As in its terms the definition stated by Hawkins J. is of a wagering contract, although he refers to the statute against "gaming and wagering," it is necessary to add some consideration of the word "gaming." Does it enlarge the scope of the Act of 1845 beyond what has been determined in the cases cited ?

There are Acts which prohibit a licensee holding a licence to sell liquor, from allowing gaming upon his premises, though the considerations that arise upon such Acts are not the same as under the Gaming Act, 1845. It is not the contract of the licensee which is avoided, but he is liable to a penalty if he suffers the act of gaming to take place on his premises.

Thus 9 Geo. 4, c. 61, s. 21, provided that the licensee "do not knowingly suffer any unlawful games or any gaming

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whatsoever on his premises." In *Reg.* v. *Ashton* (1) Lord Campbell in giving judgment quashing a conviction under this section for playing a lawful game upon licensed premises said: "If money were staked, that would be gaming; and then there might be a lawful conviction for allowing gaming in the house."

Under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17, it is provided that "if any licensed person suffers any gaming or any unlawful game to be carried on on his premises . . . . he shall be liable to a penalty."

In *Lockwood* v. *Cooper* (2) Lord Alverstone in deciding a case under this Act said that: "To amount to gaming the game played must involve the element of wagering—that is to say, each of the players must have a chance of losing as well as of winning."

In *Welton* v. *Ruffles* (3)—a case under the same Act—Avory J. says that it is sufficient if the money which is staked indirectly goes toward the prize; but the element of a chance of winning or losing money or money's worth in the games is treated as fundamental to the gaming: see also *Dyson* v. *Mason*. (4)

The words of Cotton L.J. in *Thacker* v. *Hardy* (5) are used as to "the essence of gaming and wagering"; and Lord Herschell in *Forget* v. *Ostigny* (6), when referring to that definition, says: "Cotton L.J. laid down what in his view was the essence of a gaming contract." And Channell J. in *Richards* v. *Starck* (7) also treats the definition as applicable to a gaming and wagering contract. He decided the case before him upon the question whether on the facts there was a bet, and he held that there was a bet, though on terms favourable to the plaintiff.

A consideration of these cases appears to me to show that the interpretation to be given to "gaming" must be one that involves wagering or betting. One is thus brought back

(1) (1852) 1 E. & B. 286, 289.
(2) [1903] 2 K. B. 428, 431.
(3) [1920] 1 K. B. 226, 231.
(4) (1889) 22 Q. B. D. 351.
(5) 4 Q. B. D. 685, 695.
(6) [1895] A. C. 318, 326.
(7) [1911] 1 K. B. 296, 302.

to the same question—were the contracts made with the Jockey Club by way of betting or wagering ?

If the substance of the matter is to be regarded I fail to see that there was a bet made, or that the only consideration between the Club and the defendant is the issue of the uncertain event—namely, the determination of the race for which the horse was entered. It was not the result of the race which in substance made either of the two sums of 2*l.* claimed payable to, or a win for the Jockey Club.

I agree with Clauson J. that one must look at the contracts contained in the written documents and not go outside them to alter or mitigate their terms or effect. It is on a strict interpretation of them and not only upon the substance of them, that I have reached the conclusion stated. No doubt, if the contract is by way of gaming or wagering, it must be treated as such, however it may be dressed up, for example, as in *Batson* v. *Newman* (1) or *Brogden* v. *Marriott.* (2)

But I cannot find any win for the Jockey Club as against the defendant dependent upon any gaming or wagering event to be decided between them. The payments of 2*l.* do not depend upon the issue of a "future event." These payments, and also that of the payment of the extra 3*l.*, depend upon the defendant's will. The 200*l.* is paid away by the Club if the race is run, and whether to the defendant or to some other entrant is a matter irrelevant to the payment of the entrance fee, be it larger or smaller.

In order to hold these contracts to be by way of gaming and wagering, it appears to be necessary to hold (*a*) that the Club in each contract bets with the entrants severally, and against the horse nominated by each of the entrants respectively ; and (*b*) that the Club is or may be a winner or a loser of the 2*l.* on that event—the success or failure of the entrant's horse—for it is of the essence of a wagering contract that one party should win and another lose upon the future uncertain event: see per Cotton L.J. in *Thacker* v. *Hardy* (3) and *Applegarth* v. *Colley.* (4)

(1) 1 C. P. D. 573.
(2) 3 Bing. N. C. 88.
(3) 4 Q. B. D. 685, 695.
(4) 10 Mee. & W. 723, 734.

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I have dealt with the so called stake of 200*l.*; and the 2*l.* in each contract is not payable upon a gaming or wagering event, but upon a decision of the defendant only. There is an absence of mutuality under the contract considered as a gaming or wagering contract. Nor can these sums of 2*l.* be treated as stakes in the hands of the club awaiting and dependent only upon the result of the horse race so as to induce the right to recover payment before the issue is decided or before they have been paid over.

For these reasons I am of opinion that the appeal succeeds, and must be allowed with costs. The order of Clauson J. must be discharged, and a declaration made in the action that the defendant is liable to pay to the plaintiffs as authorized stakeholders for the Newmarket First Spring Meeting, 1928, the two sums of 2*l.* with liberty to apply.

LAWRENCE L.J. This action is brought on behalf of the Jockey Club for a declaration that the defendant is liable to pay two sums of 2*l.* each alleged to be due from him by reason of his having nominated a horse for two races called the Peel Handicap and a Long Course Selling Plate, which were advertised in the Racing Calendar of April 12, 1928, to be run at Newmarket on May 3, 1928, under the Rules of Racing. The advertisement stated that nominations could only be made and accepted on the condition that the nominator subjected himself in all respects to the Rules of Racing. The nominations so made by the defendant were duly accepted, but the horse did not run in either race.

The plaintiff's case is that the effect of such nominations and acceptance was that under the terms of the advertisement and Rules of Racing the defendant became legally bound to pay to the plaintiffs, Weatherby & Sons (as the authorized stakeholders), a forfeit of 2*l.* in respect of the Peel Handicap and an entrance fee of 2*l.* in respect of the Long Course Selling Plate. Clauson J. held that, subject to the provisions of s. 18 of the Gaming Act, 1845, the effect of the nominations so made and accepted was to constitute two binding contracts between the defendant and the Jockey

Club, whereby the defendant became legally liable to pay the two sums in question as claimed. The main defence to the action is that the two contracts so constituted are contracts by way of gaming or wagering within the enacting part of s. 18 of the Gaming Act, 1845, and are thereby rendered null and void. The learned judge has decided that this defence is well founded, and has dismissed the action. Hence the present appeal.

The relevant provisions of the Rules of Racing relating to the payment and destination of entrance fees, stakes and forfeits are: that in case of plates the entrance fees go to the Race Fund (subject to the provisions of r. 159 as to disposal of surplus), and in case of sweepstakes the entrance fees and forfeits go to the winner or placed horses (r. 1); that the stakeholders shall at the expiration of fifteen days after the meeting render an account and pay over all stakes and added money to the persons entitled (r. 29); that entrance money, forfeits, stakes and arrears must be paid in cash (if so required) to the clerk of the course or authorized stakeholder, and entrance money must (if so required) be paid at the time of entry (r. 105); that entrance money shall go to the race fund of the meeting unless otherwise specified in the conditions of the race and subject to the application of surplus under Part XXII. (r. 106); that the nominator is liable for the entrance money, and that a subscriber to a sweepstakes is liable for the stake or forfeit (r. 108); that prizes, stakes and forfeits in a race belong to the winner, except as otherwise declared in the conditions (r. 155); and that should there be any surplus from entrance or subscription over the advertised value of a plate it shall be divided in the following proportions—namely, one-half of the whole surplus shall go to the Bentinck Benevolent Fund or Rous Memorial Fund, and of the other half two-thirds shall be paid to the second and one-third to the third (r. 159). The effect of these provisions is that the 2*l.* entrance fee in respect of the Long Course Selling Plate is payable by the defendant to the plaintiffs, Weatherby & Sons, as agents of the Jockey Club,

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and goes to its race fund of the Newmarket First Spring Meeting, 1928, and that the 2*l.* forfeit in respect of the Peel Handicap is payable by the defendant to the plaintiffs, Weatherby & Sons, as stakeholders for the entrants, and goes to the nominators of the winning and second horses. The learned judge has apparently held that under the defendant's contract with the Jockey Club the 2*l.* forfeit in respect of the Peel Handicap became payable to the Jockey Club for its own use, and that the Jockey Club undertook to pay to the nominators of the winning and second horses in that race (in addition to the added money of 200*l.*) a sum of money equivalent to the total amount of the stakes and forfeits it should receive in respect of that race. In my opinion that is not the true construction of the contract. It appears plain to me that as the Peel Handicap was a sweepstakes, all the stakes and forfeits payable by the entrants for that race (including the defendant's 2*l.* forfeit) had, under the Rules of Racing, to be deposited with the plaintiffs, Weatherby & Sons, as stakeholders for the depositors and not as agents for the Jockey Club, and that the Jockey Club had no beneficial interest whatever in such stakes or forfeits.

The grounds upon which the learned judge held that both contracts were wagering contracts as between the Jockey Club and the defendant were that as to the Peel Handicap the defendant on the issue of that race stood to lose his entrance money or forfeit, and to win, if his horse came in first, 200 sovereigns added money and a sum equal to the amount of the entrance fees and forfeits (less 30 sovereigns), or, if his horse came in second, 30 sovereigns, and the Jockey Club stood to lose 200 sovereigns added money and to win the defendant's entrance fee or forfeit; and that as regards the Long Course Selling Plate the defendant, on the issue of the race, stood to lose his entrance fee and to win the value of the Plate, and the Jockey Club stood to lose the value of the Plate and to win the defendant's entrance fee. With the greatest respect for the learned judge I am unable to agree with this view of the effect of the two contracts. For the reasons stated hereafter I am of opinion that in

neither contract was there any element of gaming or wagering as between the Jockey Club and the defendant.

Before considering this question further I will deal with a point made by Mr. Archer on behalf of the defendant. As I understood him, he contended that as the expression in s. 18 of the Gaming Act, 1845, was contracts "by way of gaming or wagering" and not contracts "for gaming or wagering," it was not essential for the purpose of bringing a contract within the section that the contract should itself be a gaming or wagering contract between the parties to it, and that although the two contracts in the present case, if taken singly and looked upon as isolated transactions, might not be gaming or wagering contracts yet, as they were made by the Jockey Club solely because it was entering into similar contracts with other racehorse owners in connection with the race meeting at which the two races in question were run, and as the transaction in which the Jockey Club was engaged, and of which the contracts formed part, was one concerned with the provision of money on the part both of the Jockey Club and of the entrants for the races, the destination of which money depended upon the result of the races, the contracts were contracts by way of gaming or wagering. In my opinion the conclusive answer to this contention is that the expression contracts "by way of" gaming or wagering in s. 18 means contracts "for" gaming and wagering, and relates only to contracts which are of themselves contracts by way of gaming and wagering: see per Cleasby B. in *Beeston* v. *Beeston* (1); per Lindley J. in *Thacker* v. *Hardy* (2); and per Hawkins J. in *Carlill* v. *Carbolic Smoke Ball Co.* (3) Although the surrounding circumstances relevant to the question whether a particular contract (whatever its form may be) is a gaming or wagering contract must, of course, be considered, yet the crucial test for determining whether or not it comes within the section is whether when looked at in the light of the surrounding circumstances it is a contract which contains the element of gaming and wagering as

(1) (1875) 1 Ex. D. 13, 15. (2) 4 Q. B. D. 685.
(3) [1892] 2 Q. B. 484.

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between the parties to it. The decision in *Thacker* v. *Hardy* (1) shows that a contract does not become a gaming or wagering contract because one of the parties to it enters into it with the intention of gaming or wagering unless the other party takes a part in such gaming or wagering, therefore, neither the fact that the defendant may have entered into the contracts with the intention of gaming or wagering with other persons, nor the fact that the Jockey Club has entered into the contracts with the defendant and into other contracts of a similar nature with third parties with the object of promoting gaming or wagering as between the defendant and such third parties, operates to make the contracts with the defendant gaming or wagering contracts as between him and the Jockey Club. In my judgment the only relevant inquiries in the present case are, first, whether the contracts in question were contracts by way of gaming or wagering as between the Jockey Club and the defendant; and, secondly, if they were not, whether there is any other obstacle which prevents the plaintiffs from enforcing them.

In order to determine the true nature of the contracts it is material to have regard to the position of the two contracting parties and to the considerations moving thereunder from the one to the other. The Jockey Club, as part of its activities, carries on business at Newmarket similar to that carried on elsewhere in England by many racecourse companies. It promotes and organizes horse races on Newmarket Heath, and invites racehorse owners to enter their horses for such races. It maintains a properly equipped racecourse, a staff of officials to manage the racing, and provides other facilities and accommodation (such as the free stabling, forage and lads' sleeping accommodation mentioned in the present contracts) for the purpose of enabling racehorse owners to run their horses at its race meetings. As an inducement to such owners to enter their horses for the races it offers money prizes and promotes sweepstakes. It is essential for the successful carrying on of its business that the race meetings should be well attended by the public, and in order to secure such

(1) 4 Q. B. D. 685.

attendance it is necessary to have an adequate entry for every race. It is obvious that for the proper management of its race meetings the Jockey Club must know beforehand how many and what horses are going to run in each race. For that purpose entry lists are kept and closed in due time before the meeting. It is the established custom of the Jockey Club to charge a small entrance fee for entering a horse for a Plate, which entrance fee under r. 158 of the Rules of Racing cannot exceed 2 per cent. of the advertised value of the Plate. The defendant is a racehorse owner, and as such it is of importance to him that he should have opportunities of testing the speed and endurance of his horses against other racehorses on properly kept racecourses at race meetings efficiently conducted under the Rules of Racing, so as to ensure that his horses are tested under proper and recognized conditions.

Bearing in mind the position of the respective parties as thus described the next step is to ascertain what is the real consideration moving from each party to the other under the terms of the two contracts in question. If I am right in my construction of the contract relating to the Peel Handicap there is no money consideration moving to the Jockey Club from the defendant under that contract, and the only money consideration so moving under the contract relating to the Selling Plate is the entrance fee of 2*l*. The main consideration so moving under each of the two contracts is that the defendant engages his horse to run in the race to which it relates, such engagement being, as already explained, a matter of considerable importance to the Jockey Club. The main consideration (besides the value of the prize and added money) moving from the Jockey Club to the defendant under each contract is that the Jockey Club binds itself to hold the race for which the defendant has entered his horse at the time and place and under the conditions advertised, and to allow him to run his horse on its racecourse against any other horses that may be entered for that race. Further, in the case of the Selling Plate the defendant secures the selling and claiming advantages given

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to entrants under the Rules of Racing. In view of the circumstances under which and the considerations for which the contracts were entered into, I am of opinion that they contain no gaming or wagering element as between the Jockey Club and the defendant.

The primary meaning of "wagering" is staking or hazarding something of value on the issue of an uncertain event or on some question to be decided, and its secondary and narrower meaning is betting: see The Oxford English Dictionary. In *Carlill's* case (1) Hawkins J. has given what purports to be an exhaustive definition of the expression "contracts by way of wagering" in s. 18 of the Gaming Act, 1845, which definition was apparently accepted by the Court of Appeal. According to this definition (which I will not repeat, as it has been quoted at length by the Master of the Rolls) the word "wagering" in that expression bears the narrower meaning of "betting," and three conditions have to be complied with in order to constitute a contract by way of wagering within the section—namely: (1.) there must be two persons or sides who profess to hold opposite views touching the issue of a future uncertain event; (2.) the two persons or sides must mutually agree that dependent upon the determination of that event one of them shall win from the other, and that the other shall pay or hand over to him or them a sum of money or stake; and (3.) neither of the contracting parties must have any other interest in that contract than the sum or stake he or they will win or lose, there being no other real consideration for the making of such contract by either of the parties. Clauson J. has adopted this definition of a contract by way of wagering, and has held that both the contracts in the present case fall within it. My reasons for differing from the learned judge are as follows: In the first place the Jockey Club is not interested in the result of either of the races, and it is a matter of complete indifference to it whether the horse of the defendant or that of any other entrant wins or loses. In the matter of the prize for the Plate and of the added

(1) [1892] 2 Q. B. 484, 490.

money for the sweepstakes the Jockey Club is in the position of a third party desirous of encouraging racing on its race-course, and for that reason providing prizes to be competed for by racehorse owners. The provision of such prizes is in no way dependent upon the result of the races; the prizes are given in any event. It cannot therefore be said that the Jockey Club is staking its money on the result of the races, which is an essential element of a wagering contract. In the next place the payment by the defendant of the entrance fee for the plate is in no way dependent upon the result of the race. It has to be paid by him whether his horse wins or loses and whether it runs in the race or not. When paid it becomes the property of the Jockey Club, and is not returned to the winner, who receives the prize and nothing more. As between the defendant and the Jockey Club therefore the entrance fee is not a stake hazarded upon the result of the race, and neither party stands to "win" it or "lose" it from or to the other dependent upon a future uncertain event. As regards the forfeit in respect of the sweepstakes the Jockey Club acquires no interest in it either dependent upon the result of the race or otherwise, and the defendant stands to lose it not to the Jockey Club, but to the winner of the race who is no party to the contract. In the third place both the Jockey Club and the defendant had, besides their interests in the prizes, entrance fee and stakes, the other substantial interests under the contract to which I have already referred. But even apart from any such interests and regarded from the monetary point of view only it cannot be said of the two contracting parties that they had mutually agreed that dependent upon the determination of a future uncertain event one of them should win from the other, and that other should pay over to him any sum of money. The cases of *Diggle* v. *Higgs* (1) and *Trimble* v. *Hill* (2), which were relied upon by the defendant, are in my opinion clearly distinguishable from the present case on the facts. In both these cases the agreements were held to be bets made by the contracting parties with each other, and

(1) 2 Ex. D. 422. (2) 5 App. Cas. 342.

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these decisions in effect amount to this, that a bet is none the less a bet because the parties express it in the form of a contract to make a contribution for or towards a prize to be awarded to the winner.

Having stated the reasons which have led me to the conclusion that the learned judge was mistaken in holding that the two contracts in the present case were contracts by way of wagering as between the Jockey Club and the defendant within the meaning of s. 18, I will now pass on to the reasons which have led me to the conclusion that the contracts were not contracts by way of gaming as between the parties within the section. The word "gaming" as used in the Gaming Acts in my opinion means playing a game for stakes hazarded by the players. It would appear that in *Welton* v. *Ruffles* (1) the Divisional Court gave a more extended meaning to "gaming" as used in the Licensing Acts, and held that it applied to a game played for money or money's worth where the players had paid an entrance fee for joining in the game to the licensee, but had not staked any money on the result of the game, and where the prize for which they were playing consisted of a copper kettle provided by the brewers. As, however, no argument has been addressed to this Court as to the precise meaning of the word "gaming" in s. 18, or as to the existence of any distinction between gaming within the Gaming Acts and gaming within the Licensing Acts, and as it is immaterial for the purposes of this case whether the word "gaming" bears such an extended meaning or not, I prefer not to express any opinion as to the correctness or otherwise of the decision in *Welton* v. *Ruffles*. (1) It is settled that "gaming" includes playing at games of skill as well as at games of chance: *Dyson* v. *Mason* (2), and that horse racing is a game within the meaning of the Gaming Acts: *Applegarth* v. *Colley*. (3) The expression "contract by way of gaming" in s. 18 of the Gaming Act, 1845, in my opinion means the contract resulting from the mutual promises which the

(1) [1920] 1 K. B. 226. (2) 22 Q. B. D. 351.
(3) 10 Mee. & W. 723.

players necessarily make (expressly or by implication) in playing for stakes, as to the transfer of such stakes upon the result of the game : see Halsbury's Laws of England, vol. xv., p. 266. If that be the right conception of a gaming contract it follows that neither of the two contracts in question is a gaming contract as between the parties, for the simple reason that the Jockey Club did not join in either of the games nor did it stake any money or money's worth upon the result of either of the games.

In the result I have come to the conclusion, for the reasons stated, that neither the fact that the Jockey Club, besides promoting and organizing the Selling Plate and the sweepstakes, agreed to provide the prize and added money for those races, nor the fact that the entrants agreed to pay an entrance fee for the Plate to the Jockey Club and to deposit their stakes for the sweepstakes with the authorized stakeholders operated to constitute the contracts made by the Jockey Club with the entrants contracts by way of gaming or wagering as between the Jockey Club and such entrants. In these circumstances I can see no obstacle to prevent the plaintiffs from obtaining the relief which they seek as regards the 2*l.* entrance fee for the Long Course Selling Plate, and am therefore of opinion that the appeal ought to be allowed so far as this fee is concerned.

As regards the 2*l.* forfeit payable in respect of the Peel Handicap, however, I am of opinion that different considerations apply. The Peel Handicap was a game played for stakes hazarded by the players. By entering his horse for this race the defendant agreed with the Jockey Club (as the promoters of the race) to join with the other entrants in playing a game for stakes hazarded by the players, which agreement meant, not only that he would run his horse in the race, but also that he would join with his fellow players in the mutual promises which all the players taking part in such a game by necessary implication make between themselves, that the stakes for which they were going to play should be transferred to the winner of the race ; in other words, it involved that the defendant should enter into an agreement by

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way of gaming with the other entrants for the sweepstakes. The fact that each of the entrants had entered his horse for the sweepstakes on the invitation of the Jockey Club and without prearrangement with his co-entrants does not, in my opinion, alter the nature of the game which the entrants were going to play with each other or the character of the appointment of the plaintiffs, Weatherby & Sons, as stakeholders for the players. In seeking to compel the defendant to pay his stake to the plaintiffs, Weatherby & Sons, for the purpose of its being immediately handed over by them to the winner of the Peel Handicap, the plaintiffs are in truth endeavouring to enforce for the benefit and on behalf of that winner the mutual promises necessarily implied as between the players who had agreed to enter for the game that the stakes for which they were going to play should, after the race, be transferred to the winner. The plaintiffs, in support of their claim, plead that the forfeit was payable to the plaintiffs, Weatherby & Sons, either as principals or as agents of the Jockey Club or as trustees for the winner. The defendant, on the other hand, pleads that it was payable to the plaintiffs, Weatherby & Sons, as potential stakeholders. In my opinion the defendant's plea is clearly right. It is plain that under the contract neither the plaintiffs, Weatherby & Sons, nor the Jockey Club acquired any beneficial interest in the stakes, which the entrants were hazarding upon the result of the race, and in my opinion the plaintiffs, Weatherby & Sons, were not by the terms of the contract constituted agents or trustees for the winners, but were merely named as stakeholders for the entrants. As such stakeholders they were bound under r. 29 to account for and pay over all the stakes to the winner. It is well settled that a stakeholder is the agent of each depositor with authority to pay over the stake to the winner, which authority, however, may be revoked at any time before the stakeholder had actually paid over the stake to the winner. It follows from this that the plaintiffs, Weatherby & Sons, as potential stakeholders, cannot sue the defendant for his stake, and in my opinion it equally follows that the Jockey Club cannot compel the

defendant to deposit his stake with the stakeholders, the ground in both cases being that the defendant could at any time revoke the authority of the stakeholders and obtain a return of his stake: see *Diggle* v. *Higgs*. (1) The only case which I have been able to find in which a potential stakeholder has endeavoured to establish a right to obtain payment of an unpaid stake is *Charlton* v. *Hill* (2), where the Clerk of the Course at the Lichfield Races of 1830 sought to set off an unpaid stake payable to Messrs. Weatherby in respect of an entry for a two-year-old stake to be run at the same meeting against a stake which the plaintiff had won in another race at that meeting, and Patteson J. held that there was no such right of set-off on the ground that the Clerk of the Course was a mere stakeholder, and could not have brought an action against the plaintiff for the unpaid stake.

For the reasons stated, I am of opinion that neither the Jockey Club nor the plaintiffs, Weatherby & Sons, are entitled to the relief claimed in this action in respect of the 2*l*. forfeit for the Peel Handicap.

Assuming, however, contrary to my opinion, that the contract had the effect of constituting the plaintiffs, Weatherby & Sons, or the Jockey Club, agents or trustees for the winner of the Peel Handicap, the result would be that they would thereby have become parties to the gaming contract between the entrants. As such agents or trustees the plaintiffs could only sue (if at all) in right of the winner, and any defence available against such winner would be available against them. The winner could only recover the forfeit from the defendant on the footing that the contract as to the deposit and transfer of the stake came within the proviso of s. 18 as an agreement to subscribe or contribute a sum of money for or towards a prize to be awarded to him as winner. Having regard to the decision in *Diggle* v. *Higgs* (1) (by which this Court is bound), I am of opinion that such a contract would not come within the proviso; the principle of that decision being that if a contract falls within the enacting part of the section the proviso has no application

(1) 2 Ex. D. 422. (2) (1831) 5 Car. & P. 147.

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to it. The result is that if the contract purports to constitute the plaintiffs, Weatherby & Sons, or the Jockey Club, agents or trustees for the winner it would in my opinion be null and void, and neither the winner nor his agent or trustee could enforce the deposit or transfer of the defendant's stake. Were it otherwise, every gaming contract could be rendered valid and enforceable by the players entering into a contract with the promoters of the game or some other third party and appointing him the agent or trustee for the winner to recover and hand over the stakes hazarded by them.

There only remains the question whether the 2*l.* forfeit stands in any different position from that of the full stake of 5*l.*, which the defendant agreed to contribute if his horse should take part in the race. There are two cases relating to wagering contracts in which the question of forfeits has been considered. In *Irwin* v. *Osborne* (1), where the parties had agreed upon a match between two horses for a stake of 100*l.* a side, either party to forfeit the 100*l.* in default of his horse running in the match, it was held by the Irish Court of Queen's Bench that such a forfeit could not be recovered. Lefroy C.J. in his judgment stated: "If that agreement" (that is, the agreement for the match) "be legal, there is no obstacle to prevent the recovery of the penalty for non-performance; but if illegal, the penalty can no more be recovered than damages for its non-performance." Although the learned Chief Justice uses the expressions "legal" and "illegal" in this passage it is plain from the rest of his judgment that he thereby meant "valid" and "void," as the sole question in the case was whether the agreement was void under s. 18 of the Gaming Act, 1845, and no question of illegality arose. In *Daintree* v. *Hutchinson* (2), where the parties had agreed upon a coursing match between two greyhounds for 100*l.* a side, either party to forfeit the 100*l.* in default of his greyhound running in the match, it was held that the agreement for the match was illegal, and that the payment of the forfeit could therefore not be enforced. In the course of the argument Alderson B. put this pertinent

(1) (1856) 5 Ir. C. L. 404, 406. (2) 10 Mee. & W. 85.

question to counsel (1): "Can a contract which, if carried out, could not be enforced, be enforced so far as to make a contracting party pay for not carrying it out?" The right answer to this question in my opinion is in the negative. Under the contract in the present case the defendant engages his horse for the sweepstakes, and agrees to put up a stake of 5*l.*, but if his horse does not run in the race he agrees to forfeit 2*l.*, part of the 5*l.* stake. In other words the contract is what was described in *Daintree* v. *Hutchinson* (2) as a P. P. (play or pay) contract. Although the facts in both the cases I have mentioned differ materially from those in the present case, as here we are concerned with a sweepstakes between more than two persons and no question of illegality arises, yet the principle upon which they were decided in my opinion governs the decision here. A forfeit such as the one in question, which is to form part of the stakes and go to the winner, is (as the name implies) in the nature of a penalty or damages for non-performance of the implied agreement made with the other entrants for the sweepstakes, and if that agreement be unenforceable it cannot be enforced so far as to make the defendant pay a forfeit for not carrying it out.

In the result for the reasons stated I am of opinion that the plaintiffs are not entitled to any relief in respect to the 2*l.* forfeit, and that the appeal as to this part of the case ought to be dismissed.

RUSSELL L.J. In this action the Jockey Club sue the defendant to recover payment of the sum of 4*l.* alleged to be due from him, as to 2*l.* as the result of his having entered his horse "Master Michael" for the Peel Handicap to be run at the Newmarket First Spring Meeting last year, and as to the remaining 2*l.* as the result of his having entered the same horse for the Long Course Selling Plate to be run at the same meeting. The only defence raised and argued was that the contracts made by the defendant in nominating his horse for those races were "contracts by way of gaming or wagering" within s. 18 of the Gaming Act, 1845.

(1) 10 Mee. & W. 97. (2) 10 Mee. & W. 85.

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Clauson J. held this to be the case, and dismissed the action. The plaintiffs appeal.

The first thing to do is to ascertain what in regard to each race was the contract and between whom was it made; and I will deal in the first place with the Peel Handicap.

I may say at once that I agree with the learned judge that the parties to the contracts are the defendant on the one hand and the Jockey Club on the other. There is nothing in the Rules of Racing or other documents to suggest or justify the view that the nominators made any contract with each other collectively or individually. This appeal must in my opinion be decided upon that footing.

The conditions governing the Peel Handicap were advertised in the Racing Calendar of April 12, 1928, and are set out in para. 2 of the statement of claim. They incorporate the Rules of Racing. By that advertisement the Jockey Club invites owners to nominate horses for that race upon the stated conditions, one of which is a liability to pay to the Jockey Club the sum of 5*l.* if the horse nominated starts in the race, or the sum of 2*l.* only if the horse does not start. At this point two views are possible, but it is I think immaterial which is adopted. Either the advertisement in the Racing Calendar is an offer by the Jockey Club, which becomes a contract by the acceptance of the nominator in making the nomination, or the advertisement is an invitation to the horse owners to make an offer by the nomination which becomes a contract by the acceptance of the nomination. The phrase "nominations can only be made and accepted on the condition," etc., lends colour perhaps to the latter view.

However that may be, a contract was here established between the defendant and the Jockey Club. The terms of the contract were in my opinion as follows: the defendant on his part undertook to pay 5*l.* for the right to run "Master Michael" over the Peel Course in the Peel Handicap on May 3, 1928, carrying the weight allotted by the handicapper, the defendant's liability to be reduced to 2*l.* in the event of his not exercising that right. The Jockey Club on their part

undertook: (1.) To run the Peel Handicap on the said date. (2.) To allow the defendant to run "Master Michael" over their Peel Course in the Peel Handicap as aforesaid. (3.) To pay to the nominator whose horse wins the race (*a*) a sum of 200*l*., and (*b*) the entrance moneys to be paid by the various nominators less a sum of 30*l*. (4.) To pay to the nominator whose horse is placed second the said sum of 30*l*. Those appear to me to be the promises on either side in this contract, which however is subject to an overriding provision (which in the present case never operated), that if fewer than 15 entries were obtained the Jockey Club might cancel the race and with it (under r. 169) the defendant's pecuniary liability. This statement of the contract differs from the view of Clauson J. only in this respect: that I think that the true promise by the Jockey Club is to pay the added money and entrance fees to the nominators of the first and second horses, although no doubt that involves a promise to pay the defendant if he should answer either description.

Now is that a contract by way of wagering? In making that contract have the Jockey Club and the defendant made a bet between themselves?

To the unsophisticated racing man (if such there be) I should think that nothing less like a bet can well be imagined. It is payment of entrance money to entitle an owner to compete with other owners for a prize built up in part by entrance fees, the winning of the prize to be determined not by chance but by the skill and merit of horse and jockey combined. Lord Falmouth, the most prominent and successful patron of the turf in the second half of last century, used to pride himself on the fact that (with the exception of a single sixpence wagered with the wife of his trainer) he had never made a bet on a horse race. If the defendant's counsel are correct in their contention here, he was sadly mistaken; for, according to them, he spent his life in betting with the various racing executives in this country and elsewhere. We must see if they are right, for it may be that the microscope of the law is enabled and bound to detect some betting bacillus lurking within, which converts this apparently innocent

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bargain into "a contract by way of gaming or wagering," and which turns the 2*l.* which the defendant promised in the event which happened to pay into "a sum of money . . . . alleged to be won upon a wager" for the recovery of which the stewards are forbidden to bring or maintain any suit.

Let us clear our minds of the betting atmosphere which surrounds all horse racing, and affirm a few relevant propositions. There is nothing illegal in horse racing: it is a lawful sport. There is nothing illegal in betting per se. There is all the difference in the world between a club sweepstakes on the result of the Derby and a sweepstakes horse race as defined in the Rules of Racing. In each no doubt the winner is ascertained by the result of an uncertain event, but in the case of the former the winner is ascertained by chance, i.e., the luck of the draw not the result of the race (for the result is the same whether the draw is made before or after the race); in the case of the latter the winner is ascertained not by chance, but by merit of performance. The former is a lottery; the latter is not. Finally, but for the presence in the Gaming Act, 1845, of s. 18, there can be no doubt that the liability of the defendant to pay his 2*l.* is enforceable here. The defence accordingly depends wholly upon the provisions contained in that section. It runs as follows: "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

At the outset one is struck by the proviso which (apart from authority) one would have thought qualified the previous part of the section and exempted from its operation a

transaction which might otherwise have been subject to it, if the transaction could properly be said to fall within the language of the proviso. Such a view fits in with the usual function of a proviso and with the words which here occur, "shall not be deemed to apply." It is said however that the Court of Appeal has definitely decided to the contrary in *Diggle* v. *Higgs* (1), and has laid it down, as a matter of construction of this section, that if a transaction can be made to fall within the earlier part of the section the proviso has no operation on it at all, and that the proviso only applies to cases which never did or could fall within the earlier words of the section. If this be the true view of *Diggle* v. *Higgs* (1) it binds us, and only the House of Lords can effectively entertain a different opinion; but *Diggle* v. *Higgs* (1) needs careful scrutiny. The facts were such that the transaction was a bet pure and simple between the two foot racers. Diggle promised to pay Simonite 200*l.* upon one possible issue of an uncertain event; Simonite promised to pay Diggle 200*l.* upon the other possible issue of the uncertain event. That was quite clearly a contract for a bet. The only matter alleged to bring the transaction within the proviso was that each 200*l.* was deposited with a stakeholder, and so it was said the transaction was merely a subscription of sums to a money prize for the winner. It was held that the contract was clearly a wager, and that the proviso did not take it out of the enactment, because the deposit of the money in the hands of the stakeholder did not turn a bet into an agreement to contribute to a money prize. As I read the case the decision was not (as suggested in argument here) that the proviso only applies to contributions by non-competitors, but that the facts of the particular case (there being only the two competitors) fell clearly within the words of the section and did not fall within the words of the proviso at all.

That is what I think Lord Cairns means when he says (2) that the Legislature never intended to say that if the wager is in the form of a subscription or contribution the winner

(1) 2 Ex. D. 422. (2) 2 Ex. D. 422, 426.

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may recover it. In my opinion there is nothing in the decision in *Diggle* v. *Higgs* (1) which excludes what I believe is the true operation of the proviso—namely, that while it does not enable a man to recover that which is nothing but a wager, though it masquerades as a prize, it does exclude from the operation of the section what are prizes, though composed in part of stakes contributed by competitors. In other words, I should like to decide the present case upon the simple ground that, even if the contributions by competitors do introduce some element of gaming or wagering into the transaction, which would prima facie defeat this action under s. 18, nevertheless the proviso operates according to its tenor, and the section does not invalidate the contract (whatever it be) or disentitle the plaintiffs to sue. I realize however, more particularly in view of what was said in *Trimble* v. *Hill* (2), that a decision on those lines is probably open only to the House of Lords. I realize also that the language used in the judgments in *Diggle* v. *Higgs* (3) may justify a wider view of the effect of that decision. I will therefore assume that we must act upon the view that if a transaction once falls within the words " contracts or agreements . . . . by way of gaming or wagering " the proviso can never save it.

Does the defendant's contract in relation to the Peel Handicap fall within those words ? Some subtle distinction was attempted to be drawn before us between " a contract of gaming or wagering " and " a contract by way of gaming or wagering." I am not equal to this. To me the two forms of expression carry the same meaning. To me the first question for solution here is, did the Jockey Club and the defendant by their contract make a bet with each other ?

To define a bet was never an easy task until the job was tackled by Hawkins J. after careful consideration of the relevant authorities. The result appears in his judgment in *Carlill* v. *Carbolic Smoke Ball Co.* (4) ; every word is thought out and deserves careful attention. The definition has been

(1) 2 Ex. D. 422, 426.
(2) 5 App. Cas. 342.
(3) 2 Ex. D. 422.
(4) [1892] 2 Q. B. 484, 490.

cited over and over again without so far as I know any judicial criticism. I need not read the passage, because it has already been read.

I draw attention to certain features stated to be essential to the existence of a wagering contract.

There must be two persons (or groups of persons) to the bet. One (the loser) must be bound to pay money (or money's worth) to the other (the winner) if an event happens. The other (the loser) must be bound to pay money (or money's worth) to the one (the winner) if the event does not happen. The bet is decided according as one event does or does not happen. The commonest example is the bookmaker who lays say 5 to 1 in sovereigns to A. B., a member of the public, against a particular horse for a race. In that case A. B. is backing the horse, and is being promised by the bookmaker 5*l.* if the positive event happens of the horse winning; the bookmaker is backing the field, and A. B. is promising to pay him 1*l.* if the negative event happens of the horse backed by A. B. not winning. I omit the consideration of a case of a dead heat to which special betting rules apply by which each wins and loses a moiety of the bet.

Let me now try and fit these essential features to the defendant's contract in relation to the Peel Handicap. The alleged wager falls to be decided according to the positive event of the defendant's horse winning or the negative event of his horse not winning. If the defendant's horse wins he gets the first prize, which consists of (*a*) the added money, and (*b*) the total entrance moneys less 30*l.* In one view he gets his 5*l.* back, in that (*a*) plus (*b*) will exceed 5*l.* in value: but from another point of view part of his entrance money remains behind to make up the 30*l.* But do the Jockey Club, by reason of the event happening that the defendant's horse wins, lose anything? In my opinion they do not, and cannot, under their contract with the defendant, lose anything by reason of that event. Their contract is to pay away 200*l.* and the entrance fees less 30*l.* to the winner of the race. Their liability to lose or part with the 200*l.* is absolute whichever way the two events issue, and is in no

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way contingent upon or affected by the fact of the defendant nominating the winner.

If the defendant's horse does not win the matter stands thus. The defendant has to pay his 5*l.* or 2*l.* as the case may be. To that extent he is out of pocket; but he has not paid or become liable to pay the money because his horse failed to win. He paid, or became liable to pay it, as the price of that which he in fact obtained—namely, the right to run his horse in the race.

Further, have the Jockey Club won anything? So far as I can see, not a sixpence. By the terms of their contract with the defendant the moneys paid by him are earmarked for the nominators of the first and second horses, and in addition by the same contract they have agreed to provide 200*l.* for the winner.

The essential features of a wagering contract are absent, for although under the terms of the contract it may be said that in one event the defendant wins, in the other event he does not really lose; and it must be added that whichever way the event issues the Jockey Club can never win. The result of this is, that the contract between the Jockey Club and the defendant in relation to the Peel Handicap is not a contract by way of wagering within s. 18.

But it was suggested, rather than argued, before us, that the true contract was not a bipartite contract between the defendant and the Jockey Club, but a multipartite contract between the defendant and the other nominators, and also (but I am not certain of this) the Jockey Club. In his judgment Clauson J. says that he was not sure whether counsel for the defendant disputed that the contract was one between the Jockey Club and the defendant. I have read the shorthand notes of the proceedings below, and I can find no argument based on the contrary view, nor do I recollect any such argument before us. But when the suggestion was made of a multipartite wagering contract, I invited counsel to state in terms of wagers the contracts alleged to be made by the nominators inter se. I could get no answer; nor was I surprised. The difficulties are obvious. Let me

suppose that the defendant contracts with all the other nominators jointly; what is the bet made by him with them? If the defendant's horse does not win, then I suppose the defendant loses the alleged bet; but do the other parties to the alleged bet win it? Not at all. One of them only may be said to win, but the other persons who have made the alleged bet with the defendant (who has lost his bet) must rank as losers also. Let me suppose that the defendant contracts with each of the other nominators separately. What is the bet made by him with each? If the defendant's horse does not win the defendant loses the alleged bet; but does the other party to the bet win it? Only if his horse is the one which wins the race, but not otherwise. If the horse of one of the other nominators wins the race, the result of the "bet" which I am considering is that nothing is won or lost by either party to the alleged bet.

Let me try to express in words the alleged contract between the defendant and each fellow nominator separately. It is not easy, but I think it may be done thus if we omit the complication introduced by the existence of the prize of 30*l.* for the owner of the second horse: The defendant promises A. B. that if A. B.'s horse wins the race he, the defendant, will pay to the Jockey Club to the use of A. B. 5*l.* (if the defendant starts a horse in the race) or 2*l.* (if he does not). A. B. promises the defendant that if the defendant's horse wins the race, he, A. B., will pay to the Jockey Club to the use of the defendant 5*l.* (if A. B. starts a horse in the race) or 2*l.* (if he does not). These are two contingent promises, each of which may be the consideration for the other—but they do not constitute a bet. The failure of one contingency does not carry with it the fulfilment of the other, for a third party—namely, C. D.—may be the winner.

Let me try to clothe the defendant's promise under this contract in the language of a bet and test it that way. The defendant lays A. B. X to Y against A. B.'s horse winning the race. If X and Y represent money or money's worth, that is a bet. In this case X must be 5*l.* or 2*l.*, according as the defendant does or does not himself run a horse in the

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race. But what is Y? Y is and can only be nothing. For no liability arises in A. B. to pay anything to the use of the defendant in the event of A. B. failing to win the race. A. B.'s only liability arises under the supposed promise by him to pay 5*l.* or 2*l.* to the defendant, which is contingent not on A. B. losing the race, but on the defendant winning it. If a man lays another 2*l.* to nothing against a horse, there is no bet; there is only a contingent promise to pay 2*l.*, which may or may not be nudum pactum.

The truth is that you cannot have more than two parties or two sides to a bet. You may have a multipartite agreement to contribute to a sweepstakes (which may be illegal as a lottery if the winner is determined by chance, but not if the winner is determined by skill), but you cannot have a multipartite agreement for a bet unless the numerous parties are divided into two sides, of which one wins or the other wins, according to whether an uncertain event does or does not happen.

Take a simple case of five horse owners each agreeing to contribute 10*l.* for a horse race to be run by their five horses, the owner of the winning horse to take the whole 50*l.* The only way in which that transaction could, as it seems to me, be twisted into a wager or series of wagers is to say that each one of the five has made a separate bet with each one of the other four in these terms: "I bet you a level 10*l.* that my horse will beat yours, one to win." The last three words must be added, otherwise the owner of the horse which finished last would find himself saddled with a liability of 40*l.*, not 10*l.* The addition, however, of the last three words makes the wager a contingent wager. But are the results as to pecuniary liability identical with the results of the promises to subscribe 10*l.* each? If one horse wins outright I think they are. Each of the four losers loses one contingent bet of a level 10*l.*, as to his three other bets, the contingency does not materialize. Suppose, however, that A.'s horse dead heats for first place with B.'s horse and the dead heat is not run off. How then? Have A. and B. both won within the meaning of the bets, so that C., D. and E. each loses his alleged

bets of 10*l.* with A. and B. ? Or does neither A. nor B. win the race within the meaning of the bets, so that no money passes under the bets at all ? Or do the rules of betting as to halving each bet apply, with the same resulting cancellation of liability all round ? The answer to each question in fact is "No"—because the stakes are divided. This establishes the objection to twisting a transaction which is not a wager, and was never intended to be a wager, into a wager, and shows how in so doing you may achieve a result never intended by the parties.

I am aware that certain text writers affirm that in cases where more than two competitors agree to compete for a prize made up of money subscribed by themselves, the agreement is a wager. Mr. Stutfield (Law relating to Betting, Time-Bargains and Gaming, 3rd ed., p. 37) does, and cites as authority for the statement the case of *Bentinck* v. *Connop.* (1) I can find no such decision in *Bentinck* v. *Connop.* (1) That case was decided on demurrer to several pleas, to a declaration in assumpsit. All that it decided was that a declaration, which alleged an agreement to contribute to a sweepstake sums in excess of 100*l.*, was insufficient, in view of s. 3 of 16 Car. 2, c. 7. That section provided that a person playing at certain games (which include horse racing) for money, and losing on credit more than 100*l.* at one time, was not compellable to pay. I can find nothing in the case to justify Mr. Stutfield's statement : "it was held that such an agreement was a wager and nothing more." The matter does not seem to have been treated as a bet at all, but as money lost on credit at playing a game.

Another text writer who takes the same view is the learned author of the title, "Gaming and Wagering," in Halsbury's Laws of England, vol. xvi., p. 267. He cites an additional authority—namely, *Applegarth* v. *Colley.* (2) In that case the winner of a sweepstake horse race sued the person with whom had been deposited the subscriptions (2*l.* each) of seven owners, and added money 15*l.* The total amount of the prize was accordingly less than 50*l.* The defendant pleaded that fact

(1) 5 Q. B. 693. (2) 10 Mee. & W. 723.

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as a defence, relying apparently on s. 2 of 13 Geo. 2, c. 19, which had in fact been repealed. The case was argued on demurrer, the defendant relying not of course on the repealed section, but on the following general grounds: (1.) that the whole transaction was illegal under 16 Car. 2, c. 7, and 9 Anne, c. 14; and (2.) that by the joint effect of the statute of Anne and 5 & 6 Will. 4, c. 41, all contracts for payment of money won at play were avoided. The Court decided against the defendant on both points. They held on the first point that there was no illegality. They held on the second point that the effect of the two statutes was to avoid both contract and security for future payment of money won at playing a game, but that in the case before the Court, the money having been deposited, there was no question of credit or future payment. The plaintiff accordingly got judgment on the demurrer. That is the whole decision in the case. It is true that Rolfe B. at the end of the judgment (1) in referring to a race for a sum "raised by the parties themselves" uses the language "that being in truth a wager." That is a remark made purely by the way, and has nothing to do with the points argued or decided. The case was in fact decided on the footing not of the action being one to enforce a bet, but to recover money won at playing a game.

Notwithstanding the statements of text writers, I am of opinion that you cannot have more than two parties or sides to a wager. That was, I think, clearly the view of the judges who decided *Batty* v. *Marriott*. (2) Wilde C.J. uses the following language (3): "The difficulty is in saying, when two persons, and only two, mutually agree to put down a stake, the whole of which is to be paid over to the winner, in what respect that differs from a wager." Coltman J. (4) says: "It is like a wager, because there are only two parties to it."

Although the case was argued before us on the footing of the existence of an agreement for a bet, one must not overlook the word in the section "gaming." Was there, if not a

(1) 10 Mee. & W. 734.
(2) 5 C. B. 818.
(3) 5 C. B. 828.
(4) 5 C. B. 831.

contract "by way of wagering," a contract "by way of gaming"? It is not easy to say what gaming exactly means in the section when opposed to "wagering"—but I think this is clear: it can only refer either to gambling, or to playing games for money or money's worth or to both. The old statute of Charles II. is probably the ancestor of this antithetical or alternative phrase. In that statute a distinction is drawn between persons who play at the games referred to and persons who bet on the sides or hands of such as do play thereat.

Here there is no gamble for the prize, for the prize is won not by chance, but by merit or skill. There is undoubtedly gaming in the other sense in that the owners of the starting horses play together at the game of horse racing for money or money's worth. But as I have already indicated, the defendant's contracts here are with the Jockey Club, and between the Jockey Club and the defendant there is no gaming in that sense. The Jockey Club are not playing with the defendant at the game of horse racing. The contract between the defendant and the Jockey Club cannot, I think, be a contract by way of gaming within the relevant section.

It may be said, and with truth, that these moneys if recovered by the Jockey Club will enure for the benefit of the winner or will recoup the Jockey Club for moneys already paid over to the winner. But the winner could not in my view sue the defendant, because no contract exists between them; moreover, the Jockey Club are not suing at the instance of the winner, nor could they in pursuance of any term of their contract with the winner be compelled to sue. They are suing only to enforce their own contract with the defendant, by which the defendant while acquiring the right to run his horse in the Peel Handicap did not bind himself so to do. It is not possible in my opinion to say that there existed here any contract by way of gaming.

As regards *Welton* v. *Ruffles* (1) the Divisional Court, upon the facts found by the magistrates, held that the defendant had suffered the act of gaming to take place upon his

(1) [1920] 1 K. B. 226.

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licensed premises. There was no question there of any gaming contract. The case seems to have no bearing on the problems which we have had to consider.

In the result I hold that the contract entered into by the defendant in relation to the Peel Handicap was a contract with the Jockey Club, and was not a contract by way of gaming or wagering within s. 18 of the Act of 1845. The whole case here depends upon the provisions of that section. In my opinion, the contract sued upon is not within the first portion of the section, and this action is not within the second portion, which prohibits a suit by the winner against the loser or a wager, nor is it within the third portion, which prohibits a suit by a winner of stakes against a stakeholder.

So far, I have only dealt with the Peel Handicap. I will now turn to the Long Course Selling Plate. This appears to be an a fortiori case. The prize of 200*l.* is provided by the race fund—i.e., by the executive. The entrance fees are not earmarked in any way for the winner. Under the Rules of Racing they go to the race fund, subject to the provisions of r. 159. The race being a Selling Plate carries with it certain features as to the sale by auction of the winner and other matters which appear irrelevant to the questions with which this appeal is concerned. The only relevant new feature of the contract between the Jockey Club and the defendant in regard to the Long Course Selling Plate (as compared with the Peel Handicap contract) is this: that if the entries exceeded 100 in number the entrance fees received by the Jockey Club would exceed in value the prize of 200*l.* offered by them. But for r. 159 it might in these circumstances be impossible to say that in no event could the Jockey Club win. But r. 159 in my opinion cuts out that argument. It forms part of the contract between the Jockey Club and the defendant, and effectually prevents the Jockey Club from making a gain from the transaction. If the Jockey Club in fact made a gain, they would do so not in pursuance of but in violation of their contract with the defendant.

The result is that I hold that in neither case was there a contract by way of gaming or wagering, and that the sums sued for are recoverable in this action.

I am not sorry to arrive at this conclusion, for I think it would be a travesty of the true facts to say that an owner in entering his horse for a race is gaming or wagering with the racecourse authorities. Neither he nor they intend to do any such thing. He is asked for and intends to pay an entrance fee, and nothing else. I confess I am glad that the law does not compel me to decide otherwise. I think the learned judge erred in coming to the conclusion that the Jockey Club stood to lose the 200*l.* added money and the amount of the Plate in the event of the defendant's horse proving the winner. Those amounts were never at risk at all under the contracts with the defendant: their payment never depended upon the issue of the question did the defendant's horse win or not. Under the contract (which involved holding the race on the advertised terms) those sums had to be paid away by the Jockey Club whether the defendant's horse won or not. Further I think the learned judge erred in holding that the defendant lost money in the event of his horse not winning the race. His liability to pay the 5*l.* or 2*l.* did not depend on his not winning the race. It was the price of the right to run his horse in the race.

The appeal should be allowed, the order below discharged, and in lieu thereof an order for payment should be made in the terms indicated by the Master of the Rolls.

Appeal allowed.

Solicitors for plaintiffs: *Charles Russell & Co.*
Solicitors for defendant: *Andrew, Wood, Purves & Sutton.*

W. I. C.

Applied. EDWARDS *v.* HALLIWELL.
[1950] 2 All E.R. 1064.

C. A.
1928
ROMER J.
Nov. 20, 21, 22, 23, 26, 27, 28; *Dec.* 21.
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1929
March 11, 12, 13, 14, 15.

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[1927. C. 2849.]

Trade Union—Special General Meeting—Resolutions—Alleged invalidity—Intra vires Acts—Injunction—Action against Union by individual Member suing on behalf of all Members—Procedure—Action improperly constituted—Application of Rule in Foss v. *Harbottle to Registered Trade Union—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 8.

The rule established by *Foss* v. *Harbottle* (1843) 2 Hare, 461 and *MacDougall* v. *Gardiner* (1875) 1 Ch. D. 13, 25, with regard to irregularities in matters which are intra vires a company is applicable to the case of a registered trade union.

The plaintiffs, who were members of a registered trade union, commenced proceedings against the union and certain officials of the union. The plaintiffs purported to sue on behalf of themselves and all the members of the union other than the named defendants. They claimed a declaration that a certain special general meeting was invalidly convened and that certain resolutions, which were passed at that meeting, were invalid, and they sought injunctions restraining the union from acting on those resolutions.

The effect of the resolutions was (1.) to authorize a loan to the Miners' Non-Political Movement of not more than 10,000*l.* free of interest, and (2.) to endorse the suspension from office by the general president of two of the plaintiffs:—

Held, by Romer J.: (1.) That the defendant union was a legal entity, capable of maintaining an action in its own name, and one in which the majority had power to bind the minority in matters not ultra vires the union, and that it was, therefore, not open to the plaintiffs in the present action, suing on behalf of themselves and the other members, to restrain the union from acting upon the 10,000*l.* resolution, however irregularly the meeting might have been summoned or conducted;

(2.) that the plaintiffs could not obtain any relief in respect of the suspension resolution;

(3.) that, even if the action could be regarded as properly constituted, the plaintiffs failed in their objections to the validity of the resolutions passed at the meeting.

On appeal:—

Held, that the 10,000*l.* resolutions were not ultra vires the trade union.

Held, also, that as regarded the alleged irregularities the Court must treat the union as a legal entity which held property, and was governed by the code contained in its rules, and therefore that the rule laid down in *Foss* v. *Harbottle* 2 Hare, 461 and explained by Mellish L.J. in *MacDougall* v. *Gardiner* 1 Ch. D. 13, 25 applied. If, therefore, irregularities were committed in the convening and conduct of the meeting at which the resolutions complained of were passed, the matter could be regularized by the passing of fresh and effective resolutions.

Held, therefore, that the Court would refuse to interfere by injunction at the instance of individual members of the union, and that the action must be dismissed.

WITNESS ACTION.

The following statement of the facts is taken from the considered judgment of Romer J. :—

This is an action brought for the purpose of obtaining a declaration that a special general meeting of the National Union of Seamen held on August 1, 1927, was not lawfully constituted or held in accordance with the rules of the union, and for an injunction to restrain the defendants from acting upon or carrying into effect certain resolutions purporting to have been passed at that meeting. The plaintiffs are five gentlemen who are members of the union and who purport to be suing on behalf of themselves and all the other members. The defendants are the union, its general president, its general treasurer, and its trustees.

The facts that gave rise to the action are as follows : On July 7 and 8, 1927, there was held a meeting of the defendant union's executive council. At that meeting a deputation from the South Wales Miners' Industrial Union was received, such deputation consisting, however, of representatives from several mining areas in addition to that of South Wales.

The union in question had been registered as a trade union on June 3, 1927, and was a non-political union. The deputation explained that they were practical miners who were appealing to the National Union of Seamen as being an organization which had already put politics from their midst, and that as they were forming a non-political organization they desired help in that direction.

After the deputation had withdrawn a long discussion took place between the members of the executive council. Mr. Havelock Wilson, the general president of the union, strongly advocated the giving of help by way of a loan. He pointed out that at the last annual general meeting of the union it had been decided that the union should become a non-political union, and that it had been understood that as many other unions as possible should be persuaded to

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take similar action. He stated that he had openly pursued that policy ever since, but that certain officials of the union had been scheming to overthrow his policy. He particularly referred to the attitude in this respect of Mr. Davies, the union's general secretary, and to a conference of officials which had taken place in consequence. The plaintiff, Mr. Cotter, amongst others, equally strongly opposed any support being given to the Miners' Non-Political Unions, but ultimately, after reading the minutes of the officials' meeting, the following resolution was carried on a ballot by eighteen votes to eleven: "That the resolution from the meeting referred to be adopted by the council as follows: That this conference of officials expresses their delight that this talk has been beneficial and has removed all suspicion. We further desire to recommend to the executive committee that they should give their support to the establishment of non-political unions, and encourage the growth of same, and especially among the miners."

The resolution was in an unusual form, but its meaning is clear enough. The policy which the general president had advocated was confirmed by the executive council. Mr. Havelock Wilson was not, however, content to let the matter rest there. He recommended that a special general meeting of the union should be called for August 1, 1927; that the representation should be similar to that at the annual general meeting of 1926, and that the business of the special general meeting should be "the policy of the union, and also as to who is going to be responsible for the guiding of the policy"; and in addition to deal with certain business on the agenda for that council which had not then been dealt with. It was thereupon unanimously resolved as follows: "That the suggestions of the general president as to a special general meeting on August 1, 1927, be carried out, and the business to be dealt with be as outlined above."

The following resolution was then moved and seconded and carried on a show of hands by thirteen votes to twelve: "That this council resolves that in the best interests of the National Union of Seamen we give financial support in the

way of a loan to the Miners' Non-Political Movement and that such assistance be given forthwith, the loan to be not less than 10,000*l.* free of all interest."

This resolution was passed in consequence of a suggestion of the general president. He said: "We have voted a resolution that we support the Miners' Non-Political Unions, but we have not settled to what extent. I think that resolution ought to come forward, how far we are going." Reading this in connection with the resolution approving the suggestion as to the holding of a special general meeting it would seem that this resolution as to a loan was also intended to be subject to ratification by that meeting. But after it had been moved and seconded a Mr. Wadler said: "I oppose it. It should go to the special meeting. The special meeting is called on this question, that is the way I understand it, and it is no use calling it. You commit yourself and you ask us our opinion when we have nothing else to do." To this the general president replied: "I committed myself with the consent of every official, and that document explains it also. There can be no mistake in the reading of that. The proposal is that we vote 10,000*l.* on loan free of interest." The resolution was then put to the meeting with the result stated above.

It is by no means clear what the general president meant by the words I have just quoted; but the passing of the resolution after Mr. Wadler's protest was undoubtedly regarded by some of those present as an indication that the resolution would be acted upon at once and without waiting for the special general meeting. It was indeed subsequently held by Maugham J. that they had reasonable grounds for thinking this, and he accordingly ordered the defendant union to pay the costs of an action instituted by some of the members of the union on July 13, 1927, for the purpose of restraining the union and some of its officers from acting upon the resolution.

The learned judge was not called upon to decide anything in the action but the question of costs, inasmuch as the defendants stated that they did not intend or claim the right

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to act upon the resolution. Notwithstanding the ambiguous remarks of the general president and the circumstances in which the resolution was passed I cannot, however, think that there ever was any real intention to act upon the resolution before the special general meeting had had an opportunity of expressing its views upon the matter. For I should otherwise have to arrive at the conclusion that the executive council were going to lend the sum of 10,000*l.* at least for the purpose of supporting the Miners' Non-Political Movement, while referring to a special general meeting to be thereafter called the question of whether support should be given to that movement at all, and that this was the question of policy that the general meeting was being called to consider does not, to my mind, admit of any doubt.

On August 1, 1927, there was held what purported, at any rate, to be a special general meeting of the union; whether it was, in fact, a special general meeting such as was authorized by the rules of the union, and whether it had power to pass the resolutions that I am now going to refer to, are questions that I shall have to consider in a later part of this judgment. The meeting, such as it was, purported, however, to pass the following resolutions, hereinafter called the 10,000*l.* resolutions:—

"(1.) That this meeting, endorsing the declared policy of the National Union of Seamen to promote, apply, and extend trade union principles without political activity, recommends the executive council to support the establishment and growth of movements and unions having a similar policy amongst workers in general, and in particular among the miners.

"(2.) That if it appears desirable to the executive council to provide funds out of the funds of the union for the purposes aforesaid, this meeting approves of and sanctions such a course; without prejudice to the generality of the foregoing, this meeting approves of and authorizes the executive council to make a loan of not more than 10,000*l.*, without interest, to the Miners' Non-Political Movement."

It also purported to pass another resolution, hereinafter called the suspension resolution, in these circumstances. The general president, in exercise of powers conferred or supposed to be conferred on him by the rules, had suspended three of the officials of the union—namely, Mr. Cotter, who was an organizer; Mr. Bond, the London District secretary; and Mr. Phillips, a branch secretary. The resolution was as follows: "That in order to testify the veracity of the reports and statements against Joseph Cotter, organizer, catering section; H. T. Bond, London District secretary; and Max Phillips, secretary of the Tower Hill branch, and in the general interests of the union, we endorse the general president's suspension of the aforesaid officials from their various offices until such time as a sub-committee, to be appointed by the conference, has considered the aforesaid reports, and, further, handed in their findings to the annual general meeting, to be finally dealt with by that said meeting, and during the interim we agree to pay to the aforesaid officials their full wages on the condition that until the said annual general meeting finally deals with the sub-committee's report they, the aforesaid officials, shall not directly, or indirectly, through any source speak or act to the detriment of the National Union of Seamen."

On August 4, 1927, the writ in this action was issued, the plaintiffs including Mr. Cotter and Mr. Bond. Mr. Phillips was also originally a plaintiff, but his name was subsequently struck out. By the writ the plaintiffs claimed "(1.) A declaration that an alleged special general meeting of the defendant union held on Monday, August 1, 1927, at St. George's Hall, Westminster Bridge Road, S.E. 1, was not a special general meeting legally constituted or held and was not a special general meeting according to the requirements of the rules of the defendant union and that the proceedings thereat were ultra vires; (2.) An injunction to restrain the defendants and each of them from acting upon all or any of the resolutions which purport to have been passed at such special general meeting; (3.) An injunction to restrain the defendants and each of them from acting upon the resolutions

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alleged to have been passed at such special general meeting suspending the plaintiffs Joseph Patrick Cotter Thomas Bond and Max Phillips from performing the duties of their respective offices; (4.) further and other relief; (5.) costs."

By their statement of claim the plaintiffs allege that the meeting of August 1 was not convened in accordance with the rules of the union, and that for this reason and because of certain irregularities and improprieties at the meeting the two resolutions are invalid. They did not allege in their statement of claim as originally delivered that, even if the resolutions had been regularly passed, it would be in any way ultra vires the union to carry them into effect. But at the trial the plaintiffs asked for and were given leave to amend their pleadings by alleging that the 10,000*l.* resolutions were ultra vires. They did not, however, even then allege that it would be ultra vires the union to lend money to a non-political trade union, and indeed admitted at the Bar that such an application of the union's funds would be intra vires.

The allegation introduced by the amendment was very different. It was this: "The 10,000*l.* resolutions were and are ultra vires the union. The latter of the 10,000*l.* resolutions purports to be authority to hand 10,000*l.* to the Miners' Non-Political Movement, which movement is not defined and is neither a person nor a body corporate or unincorporate and is not capable in law or in fact of receiving monies or giving a receipt for monies. The said resolution is void for uncertainty. The alleged payment is apparently to be made without any kind of security at no specified time and expressly without any liability on the part of any one to pay any interest thereon. The former of the 10,000*l.* resolutions was intended to go even further and by the use of the word 'support' to encourage the executive council to give unrestricted financial assistance not merely to the Miners' Non-Political Movement but to any 'movements and unions having a similar policy amongst workers in general.' The Miners' Non-Political Movement being undefined can have nothing in common with the union which so far from having funds to spare for financing the philanthropy of its leaders

is and was at all material times heavily overdrawn at its bank."

Sir Henry Slesser K.C. and *Norman Daynes* for the plaintiffs. The meeting of August 1 was not a properly constituted delegates' meeting and the resolutions are invalid. It is always the practice of the Court, in a proper case, to restrain executive officers from expending money improperly: see *Amalgamated Society of Railway Servants* v. *Osborne*. (1) The plaintiffs are entitled to maintain this action. The union is a legal entity for certain purposes, though not a corporate legal entity: Slesser on Trade Union Law, 3rd ed., pp. 10, 48, 58, 62. Whether it be an action on a contract or in tort or to restrain a wrongful act of a union such as the improper expenditure of money, or wrongful expulsion, or an act alleged to be ultra vires—in all these cases actions have been maintained against a union in its registered name. The plaintiffs are entitled to come to the Court and say that they object to the moneys of the trust being spent in a manner contrary to the contract entered into with the union. The question of the necessity of justice has to be considered in dealing with the rule in *Foss* v. *Harbottle* (2): see *Baillie* v. *Oriental Telephone and Electric Co.* (3) Where a body which is not a corporation is being dealt with, an individual member may come to the Court for protection. There is no authority showing that the rule in *Foss* v. *Harbottle* (2) is applicable to a voluntary society. The authorities show that it is not necessary, in order to invoke the assistance of the Court, to say that the subject-matter of the dispute is ultra vires. That is not necessary in order to justify a representative action: see *Kaye* v. *Croydon Tramways Co.* (4); see also *Salmon* v. *Quin & Axtens, Ld.* (5); *Marshall's Valve Gear Co.* v. *Manning, Wardle & Co.* (6) This is not a case of a corporation at all. Therefore the matter must be

(1) [1910] A. C. 87.
(2) 2 Hare, 461.
(3) [1915] 1 Ch. 503.
(4) [1898] 1 Ch. 358.
(5) [1909] 1 Ch. 311.
(6) [1909] 1 Ch. 267.

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approached from the point of view of a trust. The persons injured are beneficiaries and are entitled to seek the protection of the Court in respect of the property of the union: see also *Rigby* v. *Connol* (1); *Wolfe* v. *Matthews* (2); *Osborne* v. *Amalgamated Society of Railway Servants* (3); *Yorkshire Miners' Association* v. *Howden.* (4)

Luxmoore K.C. and *Ronald F. Roxburgh* for the defendants. If the resolutions are intra vires the question is one of internal management only, and having regard to *Foss* v. *Harbottle* (5), a minority cannot bring an action on a question of internal management: see also *Burland* v. *Earle* (6); *MacDougall* v. *Gardiner* (7); *Bennett* v. *National Amalgamated Society of Operative House and Ship Painters and Decorators.* (8) In view of the authorities the union can sue and be sued. The union is a statutory legal entity. The relation between the members of a trade union is the same as that between the shareholders of a company and the company itself: *Osborne* v. *Amalgamated Society of Railway Servants.* (9) In *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (10) the members of the House of Lords explain the position of a trade union: *Carter* v. *United Society of Boilermakers and Iron and Steel Shipbuilders* (11); *Baillie* v. *Oriental Telephone and Electric Co.* (12); *Kaye* v. *Croydon Tramways Co.* (13); *Salmon* v. *Quin & Axtens, Ld.* (14); *Marshall's Valve Gear Co.* v. *Manning, Wardle & Co.* (15); *Tiessen* v. *Henderson* (16); and *Pender* v. *Lushington* (17) only show that the rule in *Foss* v. *Harbottle* (5) does not apply in those particular cases.

Slesser K.C. in reply.

Cur. adv. vult.

(1) (1880) 14 Ch. D. 482, 487.
(2) (1882) 21 Ch. D. 194.
(3) [1911] 1 Ch. 540.
(4) [1905] A. C. 256, 263.
(5) 2 Hare, 461.
(6) [1902] A. C. 83.
(7) 1 Ch. D. 13.
(8) (1915) 31 Times L. R. 203.
(9) [1909] 1 Ch. 163, 174; [1910] A. C. 87, 91, 94, 98.
(10) [1901] A. C. 426.
(11) [1915] W. N. 334.
(12) [1915] 1 Ch. 503.
(13) [1898] 1 Ch. 358.
(14) [1909] 1 Ch. 311.
(15) [1909] 1 Ch. 267.
(16) [1899] 1 Ch. 861.
(17) (1877) 6 Ch. D. 70.

1928. Dec. 21. ROMER J. [after stating the facts as above set out continued:] A resolution cannot be ultra vires the union in the ordinary sense of that term. It is not until the union proceed to act upon a resolution that the question arises whether it will be ultra vires to do so; and the answer to be given to that question must depend upon the particular act done or threatened to be done. The fact, therefore, that the Miners' Non-Political Movement is not defined by the resolution and is neither a person nor a body and is incapable of receiving moneys or giving a receipt for moneys, is beside the mark. No one connected with the union can have the least doubt as to what is meant by the Miners' Non-Political Movement or would have any difficulty in giving effect to the resolution. The suggestion that it might lead to the funds of the union being lent to a non-existent person or body is ridiculous. The thing is an impossibility.

Nor can I understand what is meant by the allegation that the resolution is void for uncertainty. It does, no doubt, leave a wide discretion to the executive council to decide both as to the method and time of giving support to the non-political movement, but that fact does not make the resolution void for uncertainty. Whatever was uncertain at the date of the passing of the resolution will be made certain when the executive council has acted upon it.

The objection based on the financial position of the union was not persisted in. That position is and was at all material times an excellent one.

The resolutions cannot, in my judgment, enable the executive council to do anything that is ultra vires the union, and if the plaintiffs are to succeed in impeaching the resolutions it must be by reason of the alleged irregularity in the summoning and holding of the meeting of August 1, 1927.

The question then at once arises whether the plaintiffs can maintain this action so far as it seeks to impeach the 10,000*l.* resolution having regard to what is usually referred to as the rule in *Foss* v. *Harbottle*. (1) That rule was discussed

(1) 2 Hare, 461.

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and explained in the well known judgment of Mellish L.J. in *MacDougall* v. *Gardiner*. (1) He said this: "I think it is a matter of considerable importance rightly to determine this question, whether a suit ought to be brought in the name of the company or in the name of one of the shareholders on behalf of the others. It is not at all a technical question, but it may make a very serious difference in the management of the affairs of the company. The difference is this: Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them—some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation. In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only

(1) 1 Ch. D. 13, 24.

comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of *Mozley* v. *Alston* (1) and *Foss* v. *Harbottle*. (2)"

Now, in the present case the plaintiffs, though purporting to sue on behalf of themselves and all other members of the union, cannot, of course, sue on behalf of those members who are defendants. They do not therefore in any case represent the whole union. But they seek to restrain the union from doing certain acts which the union can lawfully do, on the ground that the meeting at which it was resolved to do those acts was not a meeting capable of so resolving. Now, the union is a defendant and appears by counsel at the Bar and states that, whether the meeting in question was or was not capable of passing the resolutions, it desires nevertheless to do the acts in question. Those acts are intra vires the union and are therefore acts which can properly be resolved upon by the majority of the union at a general meeting regularly summoned in accordance with the rules. That being so, it would seem to follow that if the defendant union were an incorporated company the present action could not be maintained. An action at the suit of individual members of an incorporated company is no doubt permissible where justice so requires. Cases in which the majority of the members are proposing to do something that is ultra vires the corporation or in which the object of the action is to recover moneys fraudulently withheld from the company by persons who themselves hold the majority of the shares, are well known instances: see the judgment of the Privy Council in *Burland* v. *Earle*. (3)

Another instance is where a company, having power to do a particular thing if sanctioned by a special resolution of its shareholders, is threatening to do it in pursuance of a special resolution which purports to have been passed, but which was not in fact properly passed. The reason why in such a

(1) (1847) 1 Ph. 790. (2) 2 Hare, 461.
(3) [1902] A. C. 83, 93, 94.

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case as that the individual shareholders can restrain the proposed act is clear; for a bare majority of the shareholders could effectually prevent the minority from using the name of the company as plaintiffs, and if that were allowed to prevent the action being brought, the company would in effect be enabled to disregard the regulations that required the passing of a special resolution as a condition of performing the act in question. *Baillie* v. *Oriental Telephone and Electric Co.* (1) was a case of this kind. So, too, in point of fact was *Tiessen* v. *Henderson* (2), though some of the observations of Kekewich J. do not seem altogether consistent with what was said in *MacDougall* v. *Gardiner*. (3)

In the case of *Kaye* v. *Croydon Tramways Co.* (4), which was much relied upon by the plaintiffs before me, no objection was taken by the defendants in the case to the form of the action. This may have been due to the fact that the action was one to restrain the defendant company from carrying out an agreement which it had entered into and which was expressly made conditional upon its being adopted by the shareholders, the allegation being that in the circumstances the condition had not been performed; or it may be that the directors who took substantial benefits under the agreement controlled the majority of the shares. I cannot at any rate regard the case as being an authority for the proposition that individual shareholders can restrain a company from acting upon a resolution purporting to have been passed by a majority of the shareholders merely because the meeting at which the resolution was passed was not properly convened or because there was some impropriety in the conduct of the meeting itself. Where the directors of a company are proposing to do or have done something which it is within the powers of the company to do, they may be acting in pursuance of resolutions purporting to have been passed at an irregular meeting, or they may be acting without a meeting of shareholders having been held at all. In either case, if individual shareholders desire to impeach or prevent the act in question,

(1) [1915] 1 Ch. 503.
(2) [1899] 1 Ch. 861.
(3) 1 Ch. D. 13.
(4) [1898] 1 Ch. 358.

they ought in general to sue in the name of the company. If it be alleged that the persons so using the name of the company are using it against the will of the majority, a meeting of the company will be directed to be held to ascertain whether this be so or not. Should the majority decide that the action should not proceed their will must prevail. They will in effect have authorized the performance by the directors of the act complained of, or confirmed what had been done at the irregular meeting. But except in cases where the majority, or, rather, a mere majority, cannot properly authorize the act so as to bind the minority, it is not open to individual shareholders to maintain an action in their own names.

It is said, however, by the plaintiffs in the present action that this principle has no application to a trade union, inasmuch as a trade union differs in material respects from an incorporated company. There are no doubt many and important differences between the two bodies, but in the case of a registered trade union are those differences material to the present question? In my opinion they are not. The principle, as I understand it, does not depend upon the existence of a corporation. The reasoning of it surely applies to any legal entity which is capable of suing in its own name and which is composed of individuals bound together by rules which give the majority of them the power to bind the minority. There does not appear to be in the books any actual decision to the effect of showing that the principle applies to such a body as a registered trade union. There is, however, a dictum of Russell J. to that effect in *Bloxam* v. *Amalgamated Marine Workers' Union.* (1) I have been supplied with a copy of the pleadings in that case and with a transcript of the judgment. It was an action brought by certain members of a registered trade union suing on behalf of themselves and all other members of a trade union against the union and two of its officials for the purpose of impeaching and having declared invalid the proceedings that had taken place at certain branch meetings, on grounds somewhat

(1) Unreported.

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similar to those on which the proceedings at the meeting of August 1, 1927, are sought to be impeached in this action. The learned judge came to the conclusion that there was no foundation for any of the grounds upon which the validity of the proceedings at the meetings was attacked, but according to the transcript, then added this: "I have dealt with all the grounds, and in my opinion they all fail. I would just add this: that taking the view that I do of the points, the question which Mr. Bennett raised as to the *Foss and Harbottle* (1) decision preventing this action being brought at all does not arise. I need not discuss it. I only say that I express my own view at the moment to be that the point taken by Mr. Bennett is a good one, that this is really an attempt by two members of the union to quarrel with the validity of the appointment of officers of the union. That is to say, they are raising a matter which is not a matter being ultra vires, but they are merely raising the question that the union has done irregularly that which might have been done regularly—that being my view, that the *Foss and Harbottle* (1) decision would operate so as to prevent these defendants bringing an action in respect of such matters in their own name as the only persons who can properly complain of it being a union."

The point was also raised in the case of *Bennett* v. *National Amalgamated Society of Operative House and Ship Painters and Decorators*. (2) The act of the trade union there complained of was one that was held to be ultra vires. The point was not therefore decided. But Warrington J. said that if it had not been a question of ultra vires the contention that it was not open to one member of the society to sue would have been a forcible one. Neither Warrington J. nor Russell J. gave any reasons for the view that he expressed, but they evidently saw no very good reason for treating the principle as inapplicable to a registered trade union. Nor can I. The true nature of such a body has been considered in more than one reported case. In *Osborne* v. *Amalgamated Society of Railway Servants* (3) a registered trade union was referred to by

(1) 2 Hare, 461. (2) 31 Times L. R. 203.
(3) [1909] 1 Ch. 163.

Lord Cozens-Hardy as being a species of quasi-corporation, and by Farwell L.J. as a statutory legal entity anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents. In the House of Lords in the same case Lord Halsbury referred to it as a legalized combination having power to act as a person.

In the case of *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1) Farwell J., in a judgment that was adopted by Lord Halsbury, said (2): "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature." And a little later he says (3): "Now, the Legislature in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation—essential, I mean, in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property."

Lord Macnaghten in the same case said (4): "The further question remains: May a registered trade union be sued in and by its registered name? For my part, I cannot see any difficulty in the way of such a suit. It is quite true that a registered trade union is not a corporation, but it has a registered name and a registered office. The registered name is nothing more than a collective name for all the members.

(1) [1901] A. C. 426.
(2) Ibid. 429.
(3) [1901] A. C. 430.
(4) Ibid. 439.

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The registered office is the place where it carries on business. A partnership firm which is not a corporation, nor, I suppose, a legal entity, may now be sued in the firm's name. And when I find that the Act of Parliament actually provides for a registered trade union being sued in certain cases for penalties by its registered name, as a trade union, and does not say that the cases specified are the only cases in which it may be so sued, I can see nothing contrary to principle, or contrary to the provisions of the Trade Union Acts, in holding that a trade union may be sued by its registered name."

Lord Brampton said (1): "I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name in the manner prescribed, and that the legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name. The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion than that in so creating it, it was intended by the Legislature that by that name and by no other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees, by s. 9 of the same Act, who hold real and personal property of the society."

Finally, Lord Lindley said (2): "The Act does not in express terms say what use is to be made of the name under which the trade union is registered and by which it is known. But a trade union which is registered under the Act must have a name; see ss. 14, 16, and Sched. I.; it may acquire property, but, not being incorporated, recourse is had to the old well-known machinery of trustees for acquiring and holding such

(1) [1901] A. C. 426, 442. (2) [1901] A. C. 444.

property, and for suing and being sued in respect of it (ss. 7, 8, 9). The property so held is, however, the property of the union; the union is the beneficial owner. Sect. 12 provides summary remedies for misapplications of the trade union's property, but there is nothing here to oust the jurisdiction of the superior Courts, and, there being nothing in the Act to prevent it, I cannot conceive why an action in the name of the trade union against its trustees to restrain a breach of trust or to make them account for a breach of trust already committed should be held unmaintainable or wrong in point of form. Further, ss. 15 and 16 of the Act of 1871, and s. 15 of the Act of 1876, impose duties on registered trade unions and penalties on them (and not only on their officials) for breach of those duties. The mode of enforcing these penalties is pointed out in s. 19 of the Act of 1871, but there is nothing there to shew that the trade union on which the duty is cast and which has to pay the penalty could not be proceeded against in its registered name. Again, I apprehend that a mandamus could go against a trade union to compel it to perform the duties cast upon it by statute; and here again the obvious course would be to proceed against the union by its registered name unless there is something in the statute to prevent it. My Lords, a careful study of the Act leads me to the conclusion that the Court of Appeal held, and rightly held, that trade unions are not corporations; but the Court held further that, not being corporations, power to sue and be sued in their registered name must be conferred upon them; and further that the language of the statutes was not sufficient for the purpose. Upon this last point I differ from them. The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights; it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is at least permissive."

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The defendant union can therefore sue in its registered name. Under its rules the supreme government of the union is vested in the annual general meeting, and at that meeting the majority of those entitled to be present can without any question bind the minority in matters not ultra vires the union. That majority could therefore, if it so thought fit, pass resolutions in the terms of the 10,000*l.* resolution, and the minority would be bound by them, subject only to the provisions contained in the rules which enables a poll of all the members of the union to be taken.

That being so, I am of opinion that it is not open to the plaintiffs in this action, suing on behalf of themselves and the other members of the union other than the individual defendants, to restrain the union from acting upon the 10,000*l.* resolution purporting to have been passed at the meeting of August 1, however irregularly that meeting may have been summoned or conducted.

Nor, in my opinion, can the plaintiffs obtain any relief in respect of the suspension resolution. This is not solely because o the rule in *Foss* v. *Harbottle* (1), because two of the plaintiffs, Messrs. Cotter and Bond, are suing not merely in their capacity of members of the union but in their capacity of officials. Their action in this respect fails for another reason. It is this. No complaint is made of the suspension of the officials by the general president, and I must assume that such suspension was lawful. It was alleged in the statement of claim that the suspensions were not preceded by any notice of any charges or any opportunity of explanation or defence, but this objection was not sustained at the Bar. The plaintiffs were not, therefore, prejudicially affected by the resolution purporting to endorse the general president's suspension. To that extent the suspension resolution was quite inoperative. The only part of it that really affected the plaintiffs was that part which purported to preserve to them their full wages. But of that the plaintiffs naturally could not complain.

It is true that the resolution attached a condition to the payment of the full wages, that the officials should not speak

(1) 2 Hare, 461.

or act to the detriment of the union; but it does not lie in the mouth of a servant of the union to complain of such a condition as that. In any case the remedy of the plaintiff officials would be in damages, and no damages were asked for at the Bar.

These observations are sufficient to dispose of the action, and it is not strictly necessary to consider the grounds upon which the plaintiffs allege that the meeting of August 1 was not properly convened or conducted. But as the case may go further, it is desirable that I should express, as shortly as may be, the conclusions at which I have arrived upon this part of the case.

The grounds upon which the competency of the meeting of August 1 are attacked are these. It is alleged, in the first place, that it was not convened by a regular meeting of the executive council inasmuch as the meeting of July 7 and 8 was not itself properly convened or constituted. It is said that it was not properly convened because the agenda papers ought to have contained, and did not contain, notice that it was proposed to discuss a loan to the Miners' Non-Political Movement or to summon a special general meeting. Now, the only rule dealing with the agenda papers of meetings of the executive council is sub-rule 19 of Rule XX., the rule relating to the position, powers, and duties of the general secretary. But all that that rule provides as to the agenda papers is that the general secretary shall send all agenda papers, stating any important business for the next meeting of the executive council, to every branch at least one week before the next branch meeting night, that the branch may discuss the question and instruct their delegates accordingly. The rule does not provide that the executive council shall have no power to transact any important business not mentioned in the agenda; whereas in the case of a special general meeting it is expressly provided by Rule XVII., sub-rule 2, that it shall have power to transact such business only as shall be stated on the notice convening the meeting. In the absence of a provision to that effect in the rules, I am not prepared to hold that a resolution passed at a meeting

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of the executive council dealing with important business is invalid merely because the agenda paper convening the meeting makes no reference to that business. But it is quite immaterial whether the resolution of the executive council as to the 10,000*l.* loan was or was not valid. The only resolution passed at that meeting that is material to the present action is the one that resolved upon the summoning of a special general meeting, and I should in any case feel great hesitation in holding that that was "important business" within the meaning of Rule XX., sub-rule 19. A proposal to hold such a meeting is scarcely a matter which the branches would want to discuss or upon which their delegates would require to be instructed. It cannot, in my opinion, be said that the meeting of the executive council was not properly convened or was incompetent to resolve upon the holding of the special general meeting of August 1.

The allegation that the executive council meeting was not properly constituted is founded upon Rule XVIII., sub-rule 11, which provides that no officer or member of the executive council shall be entitled to take part in any discussion or to vote on any matter in which he is personally interested otherwise than as a member of the union. It is said that the general president, who took part in the discussion at the meeting and also voted upon the resolution then purporting to have been passed, was personally interested in financial support being given to the Miners' Non-Political Movement. No evidence one way or the other has been given as to whether he was so interested in fact, the plaintiffs relying upon two statements made by Mr. Havelock Wilson at the meeting in question. These statements are to be found on pp. 38 and 42 respectively of the transcript of the shorthand notes of the meeting. I do not propose to read them. It is sufficient to say that, in my opinion, they do lead to the inference that the general president was personally interested in getting the council to agree to give financial support to the Miners' Non-Political Movement. The resolution passed at the meeting in favour of giving such support is therefore open to objection. But, as I have just

pointed out, the only resolution material to the present purpose is the resolution upon the calling of the special general meeting. That meeting when called might or might not promise to give the financial support. Seeing, therefore, that the executive council, if the matter were left to them, were apparently prepared to give it, it certainly was not to Mr. Wilson's pecuniary interest that the general meeting should be called at all, though no doubt he desired that it should be summoned in his capacity as a member and officer of the union.

In these circumstances it was, in my opinion, open to Mr. Wilson to take part in the discussion and to vote upon the question of the calling of the special general meeting. It follows that, in my opinion, no objection can be taken to the competency of the executive council meeting of July 7 and 8.

It is then said that the meeting of August 1 was not properly convened, in that no notice was given in the notice convening the meeting as to the proposal to support the Miners' Non-Political Movement, and least of all to support it to the extent of making a loan of 10,000*l*. It is further said that it was not in any case competent for the special general meeting to entertain this proposal, inasmuch as it could only deal with matters in fact referred to it by the executive council, and that the proposal was not one of such matters.

In order to understand these contentions, which may be taken together, it is necessary to refer to some of the rules. By Rule XVII., sub-rule 2, it is provided as follows: "A special general meeting, elected in the manner provided in this rule, if absolutely necessary, may be convened by the executive council. A special general meeting shall have power to transact such business only as shall be stated on the notice convening the meeting."

By Rule XIX. it is provided that it shall be the duty of the general president to see that all resolutions passed by the executive council in accordance with the rules are carried into effect, and that he shall act in conjunction with the

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general secretary in carrying on the business of the union in the interest of and for the welfare of the union.

By Rule XX. there is imposed upon the general secretary the duty of summoning all meetings of the union.

Rule XXI. provides that the assistant general secretary shall assist the general president and general secretary as may be required.

Now, it is said that a special general meeting can only deal with those matters which rendered the convening of it absolutely necessary. I do not so read the rule. The object of making it a condition precedent to the convening of such a meeting that such a course should appear to be absolutely necessary was no doubt to avoid the expense incidental to such a meeting being incurred without some urgent reason. When, however, there is such a reason and the meeting has to be called, I can see nothing in the rule and nothing in reason why the meeting should not deal with any matter that would be within the powers of an annual general meeting. So that even if the meeting of August 1 dealt with any matter not discussed at the executive council, it was within their competence to do so.

I could not, therefore, hold that the resolutions complained of in this action were bad because they went beyond anything that was before the executive council on July 7 and 8. But so far as the 10,000*l.* resolutions are concerned the matter was, in fact, before the executive council and was, in my judgment, one of the matters, if not the only matter, that rendered the convening of the special general meeting "absolutely necessary." It is true that the general president stated at the executive council that the only business of the special general meeting would be the policy of the union and as to who was to be responsible for the guiding of the policy. But having regard to what had previously taken place at the meeting it must have been perfectly obvious to any one there that the policy to be discussed included, even if it did not exclusively consist of, the policy of affording support to the Non-Political Trade Union Movement, and it must have been equally obvious that the question of what

shape any support should take would necessarily come up for discussion. These last observations lead me to a consideration of the question whether, having regard to the notice or notices convening the meeting of August 1, it had any power to pass the resolutions or any of them. On July 12, 1927, the general secretary sent out a notice convening the special general meeting stating in such notice in effect that it was being convened for the purpose of considering the policy of the union and also to decide who was to be responsible for the guiding of the policy, but it made no reference to the particular policy of supporting the Non-Political Trade Union Movement or the Miners' Non-Political Movement, nor did it refer in any way to the suspension of any of the officers of the union. The general secretary, in fact, followed the exact words used by the general president at the executive council and disregarded the sense in which the words had obviously been used. The words, however, were wide enough to include the particular policy in question, though in the circumstances the notice was a misleading notice.

On July 13 the general president sent out a circular dated July 12, explaining the circumstances which led up to the convening of the general meeting. In this circular he made it clear that the meeting was to decide upon the policy of aiding and supporting a Miners' Non-Political Union, and was also to inquire into the conduct of the officials with regard to the policy of the union. It did not, however, contain any reference to the specific proposal to support the Miners' Non-Political Movement by making a loan of 10,000*l.* or any other sum. The objections to the misleading nature of the general secretary's notice were not, therefore, altogether removed. On this notice, supplemented by the general president's circular, meetings of the branches for the election of delegates to the general meeting were held.

On July 23, 1927, the general president caused a further notice to be sent out by the assistant general secretary, and this notice stated that the business before the meeting would include the consideration of the 10,000*l.* resolutions. It further stated that the business would include an inquiry

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into the conduct of the officials with regard to the policy of the union, and to take such action thereon as might be thought fit.

The notice stated also that it would be necessary to have further meetings of the branches and fresh elections of delegates or confirmation of those already elected. This notice therefore contained a sufficient reference to the proposals to pass both the 10,000*l.* and the suspension resolutions, assuming it to have been in other respects a proper and valid notice under the rules. It is said, however, that the notice was inoperative and must be disregarded inasmuch as the assistant general secretary had no authority to send it out even though directed to do so by the general president. I am not prepared to take this view. If the general president took the view, and I cannot doubt that he did so, that the general secretary's notice of July 12 might result in the special general meeting resolved upon by the executive council proving wholly abortive, it was his duty to see that such a thing should not happen. He would therefore, as it seems to me, have had a right to insist upon having a proper notice summoning such meeting sent out by the general secretary. The matter was an urgent one, and at a time when he wished to give the necessary instructions to the general secretary the latter official could not be found. There is no evidence upon which I ought to arrive at the conclusion that the time was chosen so as to coincide with an absence of the general secretary that had been foreseen and waited for. In these circumstances the occasion was one when the assistance of the assistant general secretary was required and could properly be called for. In my opinion the notice of July 23 was a valid notice under the rules of the union.

It was suggested by the plaintiffs that in certain cases the notice was received too late to enable further meetings of the branches to be held. But no evidence was given as to this, and I am informed that, in fact, such meetings were held in all cases.

The next objection to the validity of the resolutions complained of in this action is that Mr. Lyddall, who was

originally one of the plaintiffs in the action, was unlawfully expelled from the meeting of August 1. Mr. Lyddall had been elected as a delegate representing the catering department in the Home District. He was, however, requested to leave the meeting as being one of the officials who had been suspended, and he did so. No such request should have been made seeing that he was present in his capacity of a member and not as an official. The matter, however, is of no importance. For it appears that the committee appointed by the meeting to examine the credentials of the various delegates reported that the Tower Hill branch, who had elected Mr. Lyddall, had not produced their minute book, and it was accordingly resolved by the meeting that their delegates were disqualified from attending. The validity of this resolution has in no way been challenged.

The next and last objection to the validity of the resolutions is that the executive council allotted delegates to branches instead of to districts and so, it is alleged, infringed Rule XVII., sub-rule 1. In order to understand this objection I must refer to Rule XVII. in some little detail.

By Rule XVII., sub-rule 2, it is provided that a special general meeting shall be " elected in manner provided in this rule." These words evidently refer to the method provided by Rule XVII., sub-rule 1, for the election of delegates to the annual general meeting. That sub-rule provides as follows : " For the supreme government of the union there shall be an annual general meeting. In addition to the general president, the general secretary, and district secretaries, who shall be members thereof ex-officio, the annual general meeting shall consist of fully paid-up members, who shall be elected by the members resident in the various districts ; each district shall be represented, and shall have as nearly as possible a fair proportion of representation in proportion to numbers of members resident or contributing therein, so that a large district may have a relative representation greater than that of a small one. The areas of the different districts shall be defined from time to time as may be necessary by the executive council. Each district shall elect its own proportion of

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representatives, and what number that proportion is, as well as the total number to be elected, shall be defined by the executive council; provided always that not more than 50 per cent. of the total delegation from any district shall be officers of the union. The executive council shall decide the proportion of officers that may represent any district."

I think that I am right in saying that this is the first mention to be found in the rules of "districts," though "branches" have been frequently referred to. In later rules, however, "districts" are frequently referred to and also "district secretaries" and "district committees," and for the general purposes of the government of the union there is no doubt that there have been for many years certain fixed areas bearing such names as "Bristol Channel District," "Home District," and so forth, those districts containing, in most cases, several branches, and the areas of those districts were, I suppose, originally determined by the executive council.

Now, at the executive council of July 7 and 8, it was resolved that the representation at the meeting of August 1 should be similar to that at the last annual general meeting. At that annual general meeting and at the preceding annual general meetings for some years past the delegates had not been elected by the districts to which I have referred, but by the branches, or in some cases groups of branches, included in those districts, and in this respect the representation at the annual general meetings was constituted differently from the representation at the executive council, whose representation was provided for in an elaborate manner by Rule XVIII. That rule rendered it requisite that for the election of ordinary members of the executive council the union should be divided into districts; that each local branch should have power to nominate candidates for the district; that such nominations should extend over a period of three weeks; that when the time for the nominations had expired each branch should take a vote on the candidates so nominated; that after final selection the name and address

of the successful branch candidate should be forwarded to the general secretary within four days of the date of the election; that the names of the candidates selected by the branches should then be printed on ballot papers for each separate district and that the members in each district should then proceed to vote for the representation on the executive council for their own district, and that the ballot should remain open for three weeks at each local office of the union. It will be observed that no such detailed method of election is prescribed by Rule XVII. in the case of the annual general meetings, or, in consequence, for special general meetings. Indeed, as regards the latter such an expensive and lengthy method of election might reasonably have been considered to be out of place and it might well have been thought desirable in the case of general meetings to allow the executive council from time to time to appoint districts differing considerably in area from the districts fixed for the purposes of Rule XVIII. and other general rules, and to let those districts elect their delegates direct. Now this is what, in my opinion, Rule XVII., sub-rule 1, has provided, and I see no reason why, for the purposes of a general meeting, it is not competent for the executive council to constitute even one branch a district for the purposes of electing delegates to general meetings, leaving the areas of districts for other purposes to remain as they are, and have been for a long time, constituted. This is what the executive council did in the case of the meeting of August 1, 1927, although, in allocating the proportion of officers that might represent any district at the meeting the executive council treated a district as being what it had been defined to be for the general purposes of the union. This, however, seems to me of little, if any, importance, as the proportion of officers representing the districts constituted ad hoc never exceeded the 50 per cent. proportion fixed by Rule XVII., sub-rule 1.

Such is the construction that the rule is, at any rate, capable of bearing, and such is the construction which has been put upon it by the executive council for many years past. Even if it be not the true construction, it is impossible to say that

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the rule is clear in its terms, especially when it is contrasted with the provisions in Rule XVIII. relating to the constitution of the executive council.

Now, amongst the powers conferred upon the executive council, there is power to interpret any doubtful rule, and the executive council having put upon it the construction in question such construction is, in my opinion, binding upon the members of the union.

I should be very sorry to come to any other conclusion, seeing that if I did so it would follow that the annual general meetings of the union for many years past have been wrongly constituted.

For these reasons I am of opinion that, even if this action could be regarded as properly constituted, the plaintiffs fail in their objections to the validity of the resolutions passed at the meeting of August 1. The action fails and must be dismissed with costs.

J. L. D.

C. A. The plaintiffs appealed. The appeal was heard on March 11, 12, 13, 14 and 15, 1929.

Sir Henry Slesser K.C. and *Norman Daynes* for the appellants. The appellants are entitled to injunctions preventing the defendants from acting on the resolutions passed at the special general meeting of the defendant union on August 1, 1927. It may be contended that the first of these resolutions did not authorize the expenditure complained of but only enabled the executive council to make it if they thought fit. The defendants have, however, stated in their defence that they intend to act on the resolution, and the defendants are the trade union, its principal officers and the trustees, whose duty it would be to make payment on the direction of the executive council. Injunctions are claimed on the grounds (1.) that the resolutions are ultra vires the trade union, and (2.) that there have been irregularities in regard to the calling and holding of the meeting at which the resolutions were passed and in matters leading up to that

meeting and that the passing of the resolutions was therefore ultra vires the meeting. It will be said that even if there have been irregularities the plaintiffs cannot maintain the action, but it is contended that if a number of persons threaten to misapply the funds of the union, a member of the union can maintain an action to restrain such misapplication, seeing that he has a proprietary interest in the funds of the union.

The president of the union had a personal interest in having a resolution passed authorizing the loan to the Miners' Non-Political Movement, for he had already himself lent them 3000*l.* for promoting the movement, which would be repaid out of the sum lent by the union to the movement.

The resolution to lend the money to the Miners' Non-Political Movement was ultra vires the union. A resolution to lend money to a non-political movement is bad for uncertainty. The defendants propose to lend money to a movement, which is not defined, and is neither a person nor a body corporate or incorporate and is not capable in law or in fact of receiving or giving a receipt for the money. The loan is not limited in any way. Further, the defendants propose to lend the money without interest. The union can only act within its rules. There is no rule which enables the union to make a loan to a non-political union which may have nothing whatever to do with trade unions. Taking the resolution as it stands it authorizes a loan to a non-existent person, which must be bad.

[RUSSELL L.J. Under the resolution the matter is left to be carried out by the executive council. The resolutions must be read together.]

In regard to the resolution relating to the suspension of the plaintiff Cotter and others, it is suggested by the defendants that no injunction should be granted, because the plaintiffs have no ground of complaint in respect of it. It is true that the president has already suspended these persons, but the resolution prejudices the plaintiffs by setting up a committee to inquire into the matter. The plaintiff Cotter is an elected official of the union and not merely a paid

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employee, and is entitled to full protection. He may not have suffered any great wrong by the resolution, but it is sufficient that he has suffered some wrong to entitle him to relief by injunction.

Turning to irregularities, which it is contended affect the validity of the two resolutions equally, the first is that this was not a valid special general meeting within Rule XVII. of the Rules of the Union, because persons acting as delegates at that meeting were not in fact duly elected. Delegates must under the rules be elected by members of the districts and each district is given a proportionate representation. In fact a large proportion of the persons attending the meeting as delegates were not elected by the proper districts.

Again, there was an irregularity in regard to the notices convening the meeting, as no notice was given of the proposal to support the non-political movement. A notice convening such a meeting must specify the business to be transacted. *Amalgamated Society of Engineers* v. *Jones* (1) is distinguishable, as it was not dealing with a special general meeting. Further the notice summoning the meeting ought to have disclosed the fact that the president of the union was personally interested in the resolution being passed.

[*Bennett K.C.* That point was not pleaded and ought not now to be considered.]

It remains to consider whether, if there were irregularities in regard to the calling of the meeting and the passing of the resolutions, the rule in *Foss* v. *Harbottle* (2) applies and prevents the plaintiffs from succeeding in their action, unless they establish that the resolutions are ultra vires the union. That rule is that in the case of a corporation acting by its majority, the Court will not give relief at the suit of a minority merely on the ground of irregularities, because the majority could at once confirm the irregular acts. It is submitted that this principle does not apply to trade unions. A trade union is a body with a peculiar constitution. Before 1871 it was a voluntary body with no legal entity. The rules constituted the contract between the members. By

(1) (1913) 29 Times L. R. 484. (2) 2 Hare, 461.

the Trade Union Act, 1871, trade unions became registrable, and in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1) it was decided that a trade union could be sued in its registered trade name: see also *Amalgamated Society of Railway Servants* v. *Osborne*. (2) But the special relationship between the members in regard to union property was recognized by the Trade Union Act, 1871, s. 8, which vested the property of the union in trustees "for the use and benefit of such trade union and the members thereof." It follows that each member has a proprietary interest in the property of the union and is a cestui que trust of the trustees. Here it is proposed to expend money in an improper manner. No doubt the trustees are primarily the persons to take action to safeguard the union property, but it was held in *Howden* v. *Yorkshire Miners' Association* (3) that an individual member could also sue. It is true that in *Howden* v. *Yorkshire Miners' Association* (3) it was only decided that an individual member could sue in respect of something ultra vires the union, and the decision left open the question whether a similar action would lie for matters only ultra vires the meeting purporting to authorize them. It is submitted that as each individual member of a union not only has a beneficial interest in the property of the union but is a cestui que trust, he can sue to prevent irregularities affecting the property, and the rule in *Foss* v. *Harbottle* (4) and *MacDougall* v. *Gardiner* (5) has no application. In *Normandy* v. *Ind Coope & Co.* (6) Kekewich J. recognized that there might be a right of action in individual shareholders to prevent irreparable injury. That applies to the present case. The cases of *Bloxam* v. *Amalgamated Marine Workers' Union* (7) and *Bennett* v. *National Amalgamated Society of Operative House and Ship Painters and Decorators* (8) referred to by Romer J. do not affect this special point, that the individual member of a union has a right to sue because of the existence of a personal fiduciary relationship.

(1) [1901] A. C. 426, 438.
(2) [1910] A. C. 87.
(3) [1903] 1 K. B. 308, 331, 340.
(4) 2 Hare, 461.
(5) 1 Ch. D. 13.
(6) [1908] 1 Ch. 84, 108.
(7) Unreported.
(8) 31 Times L. R. 203.

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The doctrine of *Foss* v. *Harbottle* (1) rests on the obligation of a member of a company when seeking to take proceedings in respect of a matter not ultra vires the company to proceed in the name of the company, and obviously if he is in a minority, the majority can prevent him from suing in the name of the company. No such difficulty arises where there is a fiduciary relationship, and the real question is whether it is proposed to commit a breach of trust. If the trustees for the union and its members are authorized to do something in a particular way and they propose to do it in some other way, they are contemplating a breach of trust and an injunction will be granted against them. It is the duty of the trustees to act in accordance with the rules : see Rules VII., XXIII., XXIV. Again, it has never yet been decided that the rule in *Foss* v. *Harbottle* (1) applies to a body that is controlled not by meetings of members but by meetings of delegates. There may be a majority of delegates in favour of a particular course, although the majority of the members are not. Here the members of the trade union have no right to direct the union to take a particular course. The control is in an artificially constituted majority.

Lastly, it has been suggested that the plaintiffs were premature in attacking the resolutions passed at the special general meeting of August 1, 1927, and should have waited until the executive council proceeded to act on them, but the plaintiffs were entitled to take proceedings quia timet : *Hopkinson* v. *Mortimer, Harley & Co.* (2)

C. A. Bennett K.C. and *Ronald F. Roxburgh* for the respondents. The only ground on which it is said that the resolution to provide money for the non-political movement was ultra vires the union is that it contemplated a loan to a non-existent body. There is no substance in this. All who passed the resolution knew that the intention was to assist non-political unions. It was so stated by the mover of the resolution at the meeting. What the executive council was being given power to do was to lend to unions of this description up to 10,000*l.* If therefore it be intra

(1) 2 Hare, 461. (2) [1917] 1 Ch. 646, 652.

vires to lend to unions of this description—as is conceded—no case can be made out of the resolution sanctioning anything ultra vires the union.

Assuming then (without admitting it) that a case can be made out of irregularities affecting the meeting, the question arises whether the principle of *Foss* v. *Harbottle* (1) applies to trade unions. The position of trade unions is defined in the *Taff Vale* case. (2) A trade union is not a corporation but a legal entity owning property vested in trustees and capable of being beneficially entitled to that property. It is an entity that can sue and be sued in its registered name, an entity limited as to the acts it can do and governed by rules. It is difficult to see why the principle of *Foss* v. *Harbottle* (1) should not be applied to an entity with these attributes. Supposing there has been an irregularity, then, unless *Foss* v. *Harbottle* (1) applies, the plaintiffs can obtain an injunction; but what injunction could prevent the union from at once doing the same thing regularly that it had already done but, as it is contended, irregularly. It was because of the futility of such an injunction that the rule in *Foss* v. *Harbottle* (1) was created: see *MacDougall* v. *Gardiner*. (3)

There is nothing in the contention that the members of the union and the trustees are in a fiduciary relationship. The real cestui que trust of the trustees is the union, for the property held by them is the property of the union: *Osborne* v. *Amalgamated Society of Railway Servants*. (4) The funds collected by a trade union become not the property of the members but the separate property of the separate entity—the trade union itself: Trade Union Act, 1871, ss. 8, 9, 10. The phraseology of those sections shows that the Legislature contemplated the ownership of property by the union. The judgment of Farwell J. in the *Taff Vale* case (5) which was approved by the House of Lords shows that the Legislature has created a trade union as a legal entity different from a

(1) 2 Hare, 461.
(2) [1901] A. C. 426, 443.
(3) 1 Ch. D. 13, 24.
(4) [1909] 1 Ch. 163, 175, 189.
(5) [1901] A. C. p. 427.

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common law corporation, which can hold property and act by its agents. It is submitted that every word in the judgment in *Foss* v. *Harbottle* (1) applies to the case of a trade union.

[They were stopped.]

Sir Henry Slesser K.C. in reply. It is submitted that concurrently with the union each member owns a share of the property of the union. In the case of a club the members do not hold the property of the club in common, but each member holds his own share. So in the case of an unregistered trade union each member is a cestui que trust of the trustees in respect of his particular share and is entitled to complain of any irregularity done by them in respect of it. That position is not altered by the Act of 1871 where the union is registered. In *Murray* v. *Johnstone* (2) it was held that a silver cup which had been presented to a club was the joint property of the individual members, and that it was ultra vires a majority of the members to give away the joint property against the wishes of the minority. If this union had been an unregistered club and irregularities had been committed each member could have complained of them, and the doctrine of *Foss* v. *Harbottle* (3) would not have applied. There is nothing in registration which takes away the right which exists apart from registration. That the members have rights distinct from those of the union is shown by the observations of Lord Shand in the *Taff Vale* case (4) and by Buckley L.J. in the *Osborne* case (5): see also *In re Printers and Transferrers Amalgamated Trades Protection Society.* (6)

A trade union is not a corporation, although it has some of the qualities of one. There is in the case of a trade union a trust of a dual nature. The trustees hold the property both for the union and for the individual members. The union is and remains a combination of individuals: see definition of "trade union" in s. 16 of the Trade Union

(1) 2 Hare, 461, 493.
(2) (1896) 23 Sess. Cas. 981.
(3) 2 Hare, 461.
(4) [1901] A. C. 426, 441.
(5) [1911] 1 Ch. 540, 567.
(6) [1899] 2 Ch. 184, 188.

Amendment Act, 1876. It may be a permanent or a fluctuating body. There being separate trusts of the property for the union and for the individual members the rule in *Foss* v. *Harbottle* (1) does not apply.

LORD HANWORTH M.R. This appeal raises an interesting and important point, which has been fully argued before us by Sir Henry Slesser and Mr. Norman Daynes.

The action is brought by Joseph Patrick Cotter, Henry Thomas Bond, Raymond John Davies, James Hamlin, James Selden Lyddall, Charles Nelson and Max Phillips, on behalf of themselves and all other members of the National Union of Seamen. It is brought for the purpose of obtaining a declaration that a special general meeting of the National Union of Seamen held on August 1, 1927, was not really constituted or held in accordance with the rules of the union, and also an injunction restraining the defendants, who are the National Union of Seamen, Joseph Havelock Wilson (the general president), William John Davies (the secretary), John Thomas Blenkin Wilson (the treasurer), Richard McGhee and Frank Foley (the trustees), from carrying into effect certain resolutions purported to have been passed at that meeting on August 1.

It is really unnecessary for me to recount the facts, which have been stated sufficiently and quite accurately, of course, by Romer J., but I must preface my judgment by referring to a few of them. The National Union of Seamen, which is a registered trade union, held a meeting, or the council of that union held a meeting, on July 7 and 8 of 1927, and at that meeting they received a deputation from the South Wales Miners' Industrial Union. That was a union which contained a number of representatives of, I think, several separate unions, but they were brought together into the union, the name of which I have given, because they were minded that this union should be what is called non-political. I have before me a little bundle of the rule books of these various unions of which the South Wales Miners' Industrial Union

(1) 2 Hare, 461.

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was a representative. This bundle was put in as an exhibit. I take one in particular—the rules of the Northumberland and Durham Miners' Non-Political Trade Union. It is to be observed that this union has, among other objects, such as to improve the conditions of work, and protect the interests of its members, and to settle disputes between its members and employers, one further object—namely, to work consistently towards furthering the principles of co-operation in all industrial life, and to discourage all party, sectional, and political interests. I may give that illustration as typical of the purpose or object which had brought into being this industrial union, the representatives of which, or a deputation from which, attended at the meeting of the council of the National Union of Seamen in July of 1927. After that deputation had placed its views before the council a long discussion took place between the members of the executive council there gathered together in meeting, and the president, Mr. Havelock Wilson, who is the general president of the National Union of Seamen, adopted the policy of acceding to the request of the deputation, that some help should be given by the National Union of Seamen to this newer body, the South Wales Miners' Industrial Union, and he advised the council to give the help by way of a loan. A full discussion took place, and certain resolutions were then passed at that meeting, one of which was in these terms: "That the resolution from the meeting referred to be adopted by the council as follows: That this conference of officials express their delight that this talk has been beneficial and has removed all suspicion. We further desire to recommend to the executive committee that they should give their support to the establishment of non-political unions, and encourage the growth of same, and especially among the miners." That resolution was carried at this meeting of the council by eighteen votes to eleven, and it was then recommended by Mr. Havelock Wilson, that although that resolution had been carried by the council, greater power and force should be given to it by having a resolution to the same purpose and end presented to, and if possible carried

at, a special general meeting. Obviously, such a special general meeting would convey far greater authority than the mere adoption of the resolution at a council meeting by eighteen votes to eleven, and thus Mr. Havelock Wilson recommended that a special general meeting should be called for August 1. That resolution was, I think, adopted unanimously. After the adoption of these two resolutions it was quite plain that the method by which assistance should be given and encouragement afforded to this non-political union would be by the course of action which was to be taken at the special general meeting which was to be called for August 1; the practical course was taken after the decision to hold a special general meeting, and a further proposition was put before this council meeting, and it was this: "That this council resolves that in the best interests of the National Union of Seamen that we give financial support in the way of a loan to the Miners' Non-Political Movement, and that such assistance be given forthwith, the loan to be not less than 10,000*l.* free of all interest." That resolution was put to the meeting, and it was carried by thirteen votes to twelve. I pause there to make some observations upon the criticism which has been directed against that resolution. One point is that it was to be a loan to the Miners' Non-Political Movement—a loose term, but I think it must have been understood by every one there that what was intended was the union whose deputation had been received at this executive meeting—and next there is some difference in the form between the resolution then adopted and the resolution ultimately adopted on August 1. In the first case it was "such assistance to be given forthwith, the loan to be not less than 10,000*l.* free of all interest," and afterwards it was "a sum of not less than 10,000*l.*"; but, treating the resolution in the sense in which it was intended—and, I have no doubt, understood by all present—it was that the resolution which had been passed in general terms for the purpose of encouraging the growth of non-political unions should take the concrete form of a loan of 10,000*l.* without interest, to be made by the National Union of Seamen to this new non-political

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union, and then another resolution was passed that the executive council endorse the action of the general president in this matter and authorize him to proceed with the same.

It appears to me, after recounting those facts, that it would not be right to hold that the resolution for lending 10,000*l.* was intended to be carried into effect offhand and without any reference to, or consideration by, the special general meeting, which it had been previously decided should be called to deal with this very question, and I think, therefore, in agreement with Romer J., that it was intended that this 10,000*l.* should be the subject of consideration, and, if possible, ratification, by the special general meeting.

On August 1 there was what purported to be a special general meeting, and at that special general meeting two resolutions were carried: "(1.) That this meeting, endorsing the declared policy of the National Union of Seamen to promote, apply, and extend trade union principles without political activity, recommends the executive council to support the establishment and growth of movements and unions having a similar policy amongst workers in general, and in particular among the miners. (2.) That if it appears desirable to the executive council to provide funds out of the funds of the union for the purposes aforesaid, this meeting approves of and sanctions such a course; without prejudice to the generality of the foregoing, this meeting approves of and authorizes the executive council to make a loan of not more than 10,000*l.*, without interest, to the Miners' Non-Political Movement." These resolutions, when adopted by the special general meeting, of course had a much more cogent force than had the resolutions passed at the executive meeting. On August 4 the writ in this action was issued by the plaintiffs, whose names I have already given, and the purpose of the action is embodied in para. 8 of the statement of claim. It says: "The 10,000*l.* resolutions and the suspension resolution"—that was a resolution with regard to suspending certain persons, including the general secretary—"were invalidated as to the suspension resolution by being contrary to natural justice, and as to all the disputed resolutions by

all or some or one of the following irregularities and improprieties"; and those irregularities and improprieties are then set out. The disputed meeting was not convened in accordance with its proper constitution, as required under the rules; there were no sufficient circumstances for making it absolutely necessary to convene the meeting; then, the only purpose for which it could be called was for dealing with the proposition of the general policy of the union in the resolution which had been passed previous to the resolution calling the special general meeting; and then (it was said) there were irregular notices of the agenda of the meeting on August 1; persons voted who were not entitled to vote; the plaintiffs Cotter, Bond, Phillips and Lyddall, all attempted to attend and take part in the disputed meeting; Cotter and Bond were unlawfully excluded, and Phillips and Lyddall were unlawfully expelled from the disputed meeting.

There is one other ground which was added by letter, and which was allowed by Romer J. That is the letter of October 29, saying that the executive council, by allotting the delegates to the branches instead of to the districts, had infringed Rule XVII., sub-rule 1.

On all those grounds it was said that the validity of the resolution to lend the 10,000*l.* was undermined, and it was not right that it should be carried into effect. Further, an amendment was allowed on November 9, and the amendment reads in these terms: "The 10,000*l.* resolutions were and are ultra vires the union. The latter of the 10,000*l.* resolutions purports to be authority to hand 10,000*l.* to the Miners' Non-Political Movement, which movement is not defined and is neither a person nor a body corporate or unincorporate and is not capable in law or in fact of receiving monies or giving a receipt for monies. The said resolution is void for uncertainty. The alleged payment is apparently to be made without any kind of security at no specified time and expressly without any liability on the part of any one to pay any interest thereon. The former of the 10,000*l.* resolutions was intended to go even further and by the use of the word 'support' to encourage the executive council to give

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unrestricted financial assistance not merely to the Miners' Non-Political Movement, but to any 'movements and unions having a similar policy amongst workers in general.' The Miners' Non-Political Movement being undefined can have nothing in common with the union which so far from having funds to spare for financing the philanthropy of its leaders is and was at all material times heavily overdrawn at its bank."

I have endeavoured, as far as I possibly can, to catalogue all the objections which have been brought against these resolutions, because I want to make it plain that the judgment of this Court, like the judgment of Romer J., is intended to cover the various points which have been pressed before us. The new paragraph, para. 6*a*, clearly shows that a contention is raised that the handing over of 10,000*l*. to this Miners' Non-Political Movement is ultra vires the union. If it is ultra vires, then the persons who are interested in the funds of the union, who may have, or may become entitled to, a share in the moneys held by the union, either by way of benefit or otherwise, would be entitled to take proceedings to stop such an action. I therefore turn to the rules which regulate both the constitution and the purpose of the union, in order to see whether the objection which is taken in para. 6*a*, which I have already read, can be sustained. In Rule III., which declares the objects of the union, I find this: "The objects and benefits of the union are subject to the conditions of membership hereinafter appearing as follows: (1.) To promote and to provide funds to extend the adoption of trade union principles. . . . ." I need not read further. The words are wide; they are intended to be wide; and so long as trade union principles are adopted, then it is quite plain from the words used that one of the objects of the National Union of Seamen is to provide funds, and to provide funds not merely for the adoption, but also to extend the adoption, of trade union principles. It appears to me, therefore—and, indeed, it was with some difficulty that this point was kept upon its legs in the argument presented to us—to be almost unarguable that there was not power by a properly constituted

resolution for a sum to be given to any object which fulfilled the simple conditions of being intended to extend the adoption of trade union principles. The other smaller points that are raised, that the word "movement" was used in the resolution, and that the loan is to be without interest, that no express hand is indicated to receive the money, that no particular document is adumbrated as forming the security or giving the terms upon which the loan is made, seem to me to be points which cannot militate against, or prevent, the action of the union in determining, if they are so minded and regularly minded, to extend by a loan the adoption of trade union principles. Looking at the resolution itself once more, it appears to me to be one which was perfectly understood as well at the executive meeting as on August 1, and that the terms of the resolution which in fact were adopted on August 1 just precisely meet some of the criticisms which have been directed against the resolution, because it leaves a certain amount of discretion to the executive council in its very terms, which are "that if it appears desirable to the executive council to provide funds out of the funds of the union for the purposes aforesaid, this meeting approves of and sanctions such a course; without prejudice to the generality of the foregoing this meeting approves of and authorises the executive council to make a loan of not more than 10,000*l*."

I desire to make this observation: these resolutions are passed by men who are well versed in trade union principles and procedure; they are adopted at meetings where there are men well accustomed to manage their own affairs; and even if some criticism could be directed by lawyers to the terms of the resolution, or to want of precision in the language used, it may well be that those resolutions can be made effective in the manner in which it was intended they should be carried out by the persons who vote in favour of them. I forbear, therefore, to apply a close scrutiny, such as could be applied by a man versed in conveyancing or drafting, to the terms which are used. It appears to me that the purpose embodied in the resolution is one which falls well within Rule III., sub-rule 1,

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and thus within the objects for which the trade union is founded, and can be carried out in the manner which is adopted for such matters by the National Union of Seamen, and was intended to be, if not expressed, impliedly indicated in the terms of the resolution.

If that be so, and the question of ultra vires is not sustainable by the plaintiffs, what is left of the complaints made about what are called these 10,000*l.* resolutions? They are matters really of irregularity, and no more; and Mr. Bennett has argued that upon such questions the doctrine of *Foss* v. *Harbottle* (1) applies—a case decided as far back as 1843, and usually used to convey a reference to the doctrine that where a constitution is given by incorporation to a company, whether under the Companies Acts or under statute, the corporation itself can put right what apparently is wrong, and that these matters of irregularity do not enure to defeat the purpose and end for which the transactions or resolutions have been adopted, but are mere matters of internal management, which do not give a right to individual members of the corporation to come in their individual characters and seek to put an end to these proceedings, for they have no power and no right to speak on behalf of the whole body —the whole entity—and the entity itself could put itself right by holding fresh meetings to cure the irregularities. In *MacDougall* v. *Gardiner* (2), which is coupled with *Foss* v. *Harbottle* (1), the principle is thus explained by Mellish L.J.: "Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation. In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something

(1) 2 Hare, 461. (2) 1 Ch. D. 13, 25.

has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes." That being so, applying that principle, if it is applicable, it would appear to cover all the objections which are taken and which I have catalogued.

There is one further objection to which I will refer—I think it is due to the general president that I should do so—namely, that on July 7 he was disqualified from taking any part in the meeting because he was a person interested, and it is said that by sub-rule 2 of Rule XVIII.: "No officer or member of the executive council shall be entitled to take part in any discussion or to vote on any matter in which he is personally interested otherwise than as a member of the union." Those words are not very easy to construe. What is said against the general president, Mr. Havelock Wilson, is this: It would seem that at some date before July 7, in order to advance the cause of the National Seamen's Union, and to carry out what he conceived to be its intention, he had already, out of funds belonging to him, made an advance of 3000*l.* to this union or movement, in the belief that that conduct of his, as general president, would be not only accepted but ratified, and, more than that, carried in a large measure into effect by the resolutions which were submitted at the executive meeting and afterwards at the special general meeting. It is doubtful whether such action on his part could in any way be brought within the rule which says that he is not to vote on any matter in which he is personally interested otherwise than as a member of the union, but I agree with the view which is taken upon this point by Romer J., that, assuming that it was, the interest Mr. Havelock Wilson had at the meeting of July 7 was to get the earliest adoption of a loan by the National Union of Seamen to the non-political union or movement, and out of that loan to get recoupment to himself of the money which

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he had advanced, such an interest would militate against his agreeing to any delay, whereas in truth and in fact his conduct in suggesting that there should be a special general meeting, and reserving the question of the actual form of the assistance to be given to the non-political movement, prevented the immediate passing of a resolution and carrying it into effect in accordance with what was his interest; and, therefore, he was not personally interested, but rather acting against his personal interest, in his conduct at the executive meeting. I have referred to that particular objection because I thought, that inasmuch as it was of a personal nature, it was right that some particular reference should be made to it in this judgment; but with regard to all the other irregularities, it appears to me that they do come within, and are covered by, the doctrine of *Foss* v. *Harbottle* (1), and the passage which I have read from the judgment of Mellish L.J. in *MacDougall* v. *Gardiner*. (2)

It has been argued, and forcibly argued, by Sir Henry Slesser that no case has yet decided that the principle of *Foss* v. *Harbottle* (1) can be applied to a trade union. It is said that a trade union is of a nature different from that of an incorporated company, and that the doctrine does not apply to trade unions. The nature of trade unions, he says, is to be found by reference to s. 8 of the Trade Union Act, 1871, which provides that: "All real and personal estate whatsoever belonging to any trade union registered under this Act shall be vested in the trustees for the time being of the trade union appointed as provided by this Act, for the use and benefit of such trade union and the members thereof." Considering those words very closely, he points out that the phrase used is not merely the "benefit of such trade union," but also the "benefit of the members thereof." The individuality, therefore, of the members composing the trade union, he says, is not lost sight of; they are not, he contends, co-operators; they have individual rights, although for certain purposes under the Act of 1871 trade unions were made legal and were given certain rights and privileges before

(1) 2 Hare, 461. (2) 1 Ch. D. 13, 25.

the law. It appears to me that this point is really governed by authority—if not in terms, at any rate in reason—when the principle is considered, What are trade unions? Lord Lindley said in the *Taff Vale* case (1), referring to s. 8, which I have read: "The property so held is, however, the property of the union: the union is the beneficial owner"; and Farwell J. (as he then was), in his judgment, which was definitely accepted in the House of Lords, said (2): "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature." I need not refer to other passages to which our attention has been called, but I will read a passage from the judgment of Farwell L.J. in the *Osborne* case (3), where he says: "A registered trade union is thus a statutory legal entity, anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents." With those passages before us it appears to me clear that we must treat a registered trade union as a legal entity—a legal entity which holds the property, no doubt, for the trusts, as pointed out by Lord Lindley, but still a legal entity which can work through its agents and is governed by the code which is contained in its registered rules. If that be so, there is no reason which would prevent the application of the doctrine laid down in *MacDougall* v. *Gardiner*. (4) Its entity is to be controlled, and is controlled by action taken under

(1) [1901] A. C. 426, 444.
(2) Ibid. 429.
(3) [1909] 1 Ch. 163, 191.
(4) 1 Ch. D. 13.

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its rules, with the result that in the present case, if some irregularity has been committed, it would be quite possible for the legal entity, by means of further meetings, further notices, and the like, to make regular what apparently, or what it is argued, is irregular, and reason and good sense would certainly dictate that the principle which applies to the entities of incorporated companies should also apply to entities created by registration under the Trade Union Acts.

One word more, in answer to the argument presented to us by Sir Henry Slesser in reply. He said that in passages which he quoted from Lord Shand's speech in the *Taff Vale* case (1) and the passage which he quoted from the *Osborne* case (2), a distinction had been drawn whereby the members were referred to as having some individual rights. That may be, and I think for the purposes of the passages where they occur the words used are correct, but they are really a reference only to the words of s. 8 of the Trade Union Act, 1871, and they do not in any way controvert the plain and clear reservations made by the authorities that I have quoted that a trade union has become a legal entity and as such is analogous to an incorporated company.

For these reasons, as well as for the reasons which appear in the very careful judgment of Romer J., it appears to me that this appeal fails, and that the judgment of Romer J. must be affirmed, and the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. This litigation is the outcome of a difference of opinion which has unfortunately arisen between the members of the union as to the advisability of adopting the policy of helping forward the Miners' Non-Political Movement, and more particularly as to whether the union should give financial support to that movement by making an advance or otherwise providing money out of its funds. The majority of the members of the union is in favour of adopting that policy and of advancing a sum of

(1) [1901] A. C. 426, 441. (2) [1911] 1 Ch. 540, 567.

not less than 10,000*l.* out of the funds of the union to help forward that movement. There is, however, a minority which holds the opposite view, and the plaintiffs are members of that minority. The main relief which the plaintiffs seek in this action is to prevent the funds of the union being applied to further the Miners' Non-Political Movement.

The first question which naturally arises is: Is the application of the funds of the union for such a purpose ultra vires the union? If it is, there can be no question that every member of the union is entitled to restrain such application. It is contended that this application is ultra vires on two grounds, being the only grounds upon which Sir Henry Slesser told us that he based his contention on this point. The first is that under the resolution the loan was intended to be made to a movement, which is not defined, is neither a person nor a body corporate or incorporate, and is not capable in law or in fact of receiving or giving a receipt for money. The second ground is that the loan was intended to be made without interest. The validity or invalidity of these two grounds depends, first, upon the true meaning of the resolution, and secondly, upon the true meaning of Rule III., sub-rule 1, which defines the objects of the union. I am clearly of opinion that on the fair construction of the resolution (regard being had particularly to the first branch of it) it means that the executive council is authorized to lend money *in support* of the Miners' Non-Political Movement. The policy which the meeting adopted by the first branch of the resolution was to promote, apply and extend trade union principles without political activities, and then it "recommends the executive council to support the establishment and growth of movements and unions having a similar policy amongst workers in general and in particular concerning the miners." The movement referred to in the latter half of the resolution is one of the movements which the executive council was recommended to support, and in my judgment there is nothing in the point taken by Sir Henry Slesser that this resolution was intended to enable the executive council to lend money to a non-existent person,

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an assumption which Romer J. described as ridiculous. The next point is whether the fact that the loan was to be made without interest can in any way be said to be ultra vires the union. The objects of the union as defined by Rule III., sub-rule 1, were " to promote and to provide funds to extend the adoption of trade union principles." In the present case the provision of funds takes the form of advancing money without interest to extend the trade union principles by financially supporting the Miners' Non-Political Movement. The provision of funds within the rule would, in my opinion, clearly include either a gift of money or an advance of money, or the provision in any other manner of money to forward such a movement. Whether the advance be with or without interest is a matter to be determined by the union or by the executive council, and clearly comes within the objects as defined by the rule. The result is that, in my judgment, both grounds fail, and the resolution is not ultra vires the union.

But then it is said that the resolutions were irregularly passed; and the plaintiffs have tabulated a number of technical irregularities which they allege have taken place in convening and holding the relevant meetings, and in the constitution of the personnel of the general meeting. The nature of these irregularities can be stated quite shortly. It was said, first, that no special general meeting can be held unless it is resolved upon as being necessary by the executive council, and that in this case the notice convening the executive council for the purpose of resolving upon the special general meeting was not sufficient to justify such a resolution being passed. Next, it was said that at the meeting of the executive council the general president took part in the proceedings and voted upon the resolution to convene the special general meeting having a personal interest, which disentitled him to take any such part or give any such vote. Then, it was said that the notice of the special general meeting for August 1 having been sent out properly by the secretary, two further notices were subsequently sent out irregularly extending the business to be conducted at the special general

meeting, which business had not been mentioned by the executive council. Lastly, it was said that the constitution of the general meeting was wrong, in that the officers of the union had been elected by a different electorate from that of the ordinary members, and that under Rule XVII. the districts, whatever they might be, ought to be the same both for the election of officers and for the election of ordinary members. I have stated the nature of these irregularities with a view to emphasizing the fact that they are all irregularities in matters affecting the internal management of the union, which could be regularized by the majority of the members assembled in a properly convened general meeting of the union.

Now that being so, it becomes necessary to consider whether the rule in *Foss* v. *Harbottle* (1) applies to such a union as this, or whether, as is contended by the plaintiffs, any member of the union can come to the Court and obtain an injunction restraining a resolution of the union or of the executive council being carried into effect if there has been any irregularity in the proceedings under the rules. Bearing in mind the nature of such a union as this, the position in life of the members, the fact that the rules are obviously framed without legal assistance, and the fact that the persons who manage the affairs of the union, convene meetings and arrange for the election of delegates are not lawyers, I think that it would be lamentable if a technical breach of the rules were held to entitle a dissentient member or minority to obtain an injunction to restrain the carrying out of a resolution of the union.

The rule in *Foss* v. *Harbottle* (1), so far as applicable to the facts of the present case, can be quite generally stated as follows: if an act is intra vires the corporation, and therefore one which could be sanctioned by the majority of the corporators properly assembled in general meeting, the Court will not entertain any proceedings to restrain the doing of the act resolved upon unless such proceedings are brought by the majority of the corporators *and in the name*

(1) 2 Hare, 461.

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of the corporation itself. If dissentient members desire to restrain an intra vires act the action must be brought in the name of the corporation, which is the only proper plaintiff in such a case. It may often be a matter of dispute whether the plaintiffs in such an action are entitled to use the name of the corporation, and in such a case the question can be tested at once by the Court directing that a general meeting of the corporation should be held. In my opinion the Court of Appeal in *Howden* v. *Yorkshire Miners' Association* (1) was distinctly of opinion that the rule in *Foss* v. *Harbottle* (2) should be applied to trade unions unless, as Stirling L.J. said (3), there be something in the Trade Union Acts or in the nature of the constitution of trade unions to prevent the application of that rule. It is obvious, to my mind, that the learned Lord Justice, after having considered the relevant parts of the Act of 1871, had not observed any such obstacle. It is contended by Sir Henry Slesser that the fact that the property of the union is vested in trustees, who by s. 8 are declared to be trustees not only for the union, but also for the members thereof, prevents the application of the rule. He put it as high as this, that under that section the trustees are trustees of the property for the individual members of the union, and that the trustees are not entitled to part or deal with the trust property if any single member objects, unless it is shown that the letter of the rules has been strictly complied with; and if there be any irregularity in summoning or holding a meeting the trustees cannot properly act upon a resolution passed at that meeting, unless they first obtain the consent of every member of the union. In my judgment that contention is not well founded. It has been held that the property of the union is vested in the trustees for the benefit of the union and not for the benefit of the individual members in the sense contended for. Lord Lindley, in the *Taff Vale* case (4), said: "The property so held is, however, the property of the union: the union is the beneficial owner." What the position might be where

(1) [1903] 1 K. B. 308.
(2) 2 Hare, 461.
(3) [1903] 1 K. B. 336.
(4) [1901] A. C. 426, 444.

the union is not registered under the Act need not be considered, because I agree with what has been said during the argument by my colleagues, that such a case would depend upon an investigation of the rules of the union concerned. Here we have the case of a union which is registered and is the primary beneficiary of the trust created by s. 8 of the Act. Whatever may be the effect of the addition of the words "and the members thereof" in the section, the crucial fact remains that the disposal of the property is, in the present case, in the hands of the executive council or in the hands of the majority of the members assembled in general meeting, and I cannot find anything in the Acts or in the constitution of this union to prevent the application of the rule in *Foss* v. *Harbottle*. (1)

I do not propose to go through the cases which have already been carefully reviewed both by the Master of the Rolls and by Romer J. for the purpose of showing that the rule in *Foss* v. *Harbottle* (1) is applicable by analogy to trade unions of the kind we have here. All I desire to say is that the trend of the decisions is in favour of that view, and that in my opinion, as already indicated, there are strong reasons for applying the rule to such bodies as trade unions.

For these reasons I agree that this appeal ought to be dismissed with costs.

RUSSELL L.J. I am of the same opinion, and I can state my reasons briefly.

The first point that we have to deal with is to construe the resolution in respect of which this action now survives. I say "now survives," because under the stress of the argument all claim is given up to relief in respect of the various resolutions set out in the statement of claim with the exception of a portion of one, and the portion in question is that contained in the last four lines of para. 6 (*a*) of the statement of claim, which runs as follows: ". . . . Without prejudice to the generality of the foregoing this meeting approves of and authorises the executive council to make a loan of not

(1) 2 Hare, 461.

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more than 10,000*l.* without interest to the Miners' Non-Political Movement." In my opinion, reading those words in the light of the previous part of the resolution, it is clear that the meaning of that resolution is this: it is a resolution approving of the application of the union's funds up to an amount of 10,000*l.* for the purpose of supporting the Miners' Non-Political Movement, and the method of support was to be by way of loan without interest.

Having so construed the resolution, the next question is: Is that a resolution which it was within the powers of the trade union to pass? In my opinion, clearly it was, in view of the provision of sub-rule 1 of Rule III., which includes amongst the objects of the union to provide funds to extend the adoption of trade union principles.

This being a resolution intra vires the trade union, the next question is this: is it open to individual members of the union to complain of that proposed intra vires application of the trade union funds?

In considering that question I am going to assume in favour of the plaintiffs that all and every the allegations of irregularities concerning both the meeting of the executive council on July 7 and 8, and concerning the special general meeting on August 1, are true allegations. I am not saying that they are, but I am going to assume they are, and upon that assumption let me repeat my question: Is it open to individual members of this trade union to complain of the proposed intra vires application of the union funds? In my opinion, no, the reason for the negative answer being the rule in *Foss* v. *Harbottle* (1); and, as I understand that rule, it is this, that the only possible plaintiff in an action to stop an act intra vires the corporation is the corporation itself.

In reply to that it was suggested by Sir Henry Slesser that the rule in *Foss* v. *Harbottle* (1) has no application to a registered trade union; because, as he alleged, the members of a registered trade union have a proprietary interest in the union's funds which they are individually entitled to protect; and for that he relies upon the words of s. 8 of the Act of 1871, which

(1) 2 Hare, 461.

provides that—I read it shortly—" all the real and personal estate whatsoever belonging to any trade union registered under this Act shall be vested in the trustees for the time being of the trade union appointed as provided by this Act, for the use and benefit of such trade union and the members thereof." That is the relevant portion of the section. But notwithstanding those words relating to the members, it is, in my opinion, clear, as was stated by Lord Lindley in the *Taff Vale* case (1), that the beneficial owner of the funds is the union and not the individual members of the union. Whatever the exact nature of the interest of the members may be, it is subject to the uncontrollable power of the union to apply the union funds for intra vires purposes, and so the opportunity for the application of the *Foss* v. *Harbottle* (2) rule equally applies.

Then the second argument against the application of the *Foss* v. *Harbottle* (2) rule was this, that in regard to this particular trade union it was inapplicable, because the general meetings were not meetings of the members of the union but were meetings only of delegates. That is a perfectly true allegation, because as I read Rule XVII., the general meetings, whether they are annual general meetings or special general meetings, are composed of delegates appointed by the members, and are not composed of the body of members themselves. But, in my opinion, that makes no difference to the application of the rule. That appears to me to be only a question of the machinery by which, under the constitution of the particular union, the views and desires of the union are to be ascertained.

The rule in *Foss* v. *Harbottle* (2) really works by means of something in the nature of a dilemma. The only possible plaintiff to stop an intra vires act is the corporation itself. If an individual is in a position to be able to use the name of the corporation then the majority are in agreement with him. If he is not in a position to use that name, then the majority are in disagreement with him, and he is not entitled to bring an action in his own name.

(1) [1901] A. C. 426, 444. (2) 2 Hare, 461.

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For these reasons I agree that the appeal fails, and should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *White & Co.*

Solicitors for defendants: *Vizard, Oldham, Crowder & Cash.*

W. I. C.

C. A. 1929 — EVE J. *Jan.* 25. — C. A. *March* 21, 22.

In re SMALLEY.

SMALLEY *v.* SCOTTON.

[1928. S. 3887.]

Will—Construction—Gift to "my wife E. A. S."—Bigamous Marriage of Testator—Lawful Wife surviving not named "E. A. S."—Secondary Meaning of "wife"—Testator's Intention to benefit Woman with whom he was living.

A testator by his will gave all his property to "my wife E. A. S." The testator left a lawful wife M. A. S. and children by her and contributed to their support, but about five years before his death had contracted a bigamous marriage with a widow E. A. M. who lived with him and was known as E. A. S., and believed she was, and was reputed to be, his wife. The will was produced by E. A. M.:—

Held (reversing the decision of Eve J.), that the will, taken in connection with the surrounding circumstances, indicated that the testator intended to benefit E. A. M., she being in a secondary sense and by repute his "wife," and therefore she was entitled, although not his wife nor bearing his surname.

Doe v. *Rouse* (1848) 5 C. B. 422 and *In re Wagstaff* [1908] 1 Ch. 162 applied.

ORIGINATING SUMMONS.

Arthur Smalley, by his will dated March 4, 1925, therein described as of No. 1A Charles Street, Pendleton, in the county of Lancaster, after appointing Alexander Scotton and another executors thereof, proceeded as follows: "I give devise and bequeath unto my wife Eliza Ann Smalley all my possessions absolutely."

The testator died on July 14, 1928, and his will was duly proved by A. Scotton on August 15, 1928, the other executor named in the will having renounced probate.

The estate, which was valued at 856*l.* 17*s.* 9*d.*, was claimed by the testator's widow Mary Ann Smalley and by Eliza Ann Mercer, with whom the testator went through a ceremony of marriage on May 2, 1924.

The following statement of the facts is taken from the judgment of the Master of the Rolls: "On May 1, 1899, the testator married Mary Ann Pollard and lived with her for some time, and there were four children of the marriage. In 1910 he left his wife and seems to have led a somewhat roving life, but in 1915 he went to live in or near Manchester, and in that year settled in Manchester, where he obtained employment as a fish salesman. The evidence of his wife is that he used to visit her, or she used to visit him every three months, or so, that from time to time he was in touch with her until his death, and that he contributed a sum of 15*s.* a week towards the maintenance of herself and children. While in Manchester he made the acquaintance of a Mr. and Mrs. Mercer, who kept a public house there, and after Mr. Mercer's death, he, on May 2, 1924, went through the form of marriage with his widow, Eliza Ann Mercer, who did not know that he was already married. They lived together as husband and wife, and at the time of his death he was cohabiting with her. On his death, Eliza Ann Mercer produced the will in question which apparently was given to her, or at any rate was in her custody, or was in some place where she could put her hand on it."

On October 30, 1928, this summons was taken out by Mary Ann Smalley against A. Scotton and Eliza Ann Mercer for the determination of the question whether according to the true construction of the will under the gift to "my wife Eliza Ann Smalley" the plaintiff was entitled to the residuary estate of the testator or some other and what person was so entitled, or whether the gift was void for uncertainty and the residuary estate undisposed of.

The summons was heard before Eve J. on January 25, 1929.

G. G. Solomon for the plaintiff Mary Ann Smalley. The testator's lawful wife is entitled, and the word "wife" prevails

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over the Christian name Eliza, which must be rejected as falsa demonstratio. The other names fit.

[He referred to *In re Stephenson* (1); *Charter* v. *Charter* (2); *Drake* v. *Drake* (3); *Thomas* v. *Thomas* (4); *Adams* v. *Jones* (5); *Bradshaw* v. *Bradshaw*. (6)]

G. E. Tyrrell for the defendant Eliza Ann Mercer. The defendant was not the wife of the testator, but she believed she was his wife, and was reputed where he lived to be his wife. The name prevails over the word " wife," which must be rejected as falsa demonstratio.

EVE J. If evidence as to what the testator intended were admissible Mr. Tyrrell's position would be a very strong one, but I cannot look at that evidence. The testator had a lawful wife and several children living, he contracted a bigamous marriage with a Mrs. Mercer, and for many years had been living a double life, contributing 15*s*. a week towards the support of his wife and children, and doing his best to conceal from each of these women the existence of the other.

The so-called " wife " Eliza Ann Smalley was not his wife, nor was her name Smalley. His lawful wife was Mary Ann Smalley, not Eliza Ann Mercer. The gift to " my wife " is sufficient to identify the woman to take as being his lawful wife. The substitution of Eliza for Mary in the name must be rejected as a misdescription. Mr. Solomon's client is entitled as universal legatee. The respondent must have her costs out of the estate as between solicitor and client.

H. L. L.

C. A.

The defendant Eliza Ann Mercer appealed. The appeal was heard on March 21, 22, 1929.

Manning K.C. and *G. E. Tyrrell* for the appellant. The testator having given the Christian names of the appellant, she is entitled to take. It is true that he refers to her as his " wife " and gives her his surname, but the word " wife," like any other term, can be used in a popular sense, and the

(1) [1897] 1 Ch. 75.
(2) (1874) L. R. 7 H. L. 364, 370.
(3) (1860) 8 H. L. C. 172, 173.
(4) (1796) 6 Term Rep. 671.
(5) (1852) 9 Hare, 485.
(6) (1836) 2 Y. & C. (Exch.) 72.

appellant, with whom the testator had contracted a bigamous marriage, passed as and believed herself to be his wife. The fact that he gave her his surname carries the matter no further. It is as if he had again called her his wife. Apart from authority, it is contended that this argument ought to prevail; but the matter does not stop there. In *Doe* v. *Rouse* (1), under exactly similar circumstances, the gift was made by the testator to his "dear wife Caroline." Caroline, who was a bigamous wife, was held entitled. The same principle was acted on in *Lepine* v. *Bean*. (2)

[LORD HANWORTH M.R. referred to *Doe* v. *Huthwaite*. (3)]

This case is really covered by *Doe* v. *Rouse* (1): see also *In re Wagstaff*. (4)

Spens K.C. and *G. G. Solomon* for the respondent. This case is distinguishable from *Doe* v. *Rouse* (1) on the facts. Here the testator had not broken off relations with his true wife, but actually was until his death sending her money weekly for maintenance. In view of these facts, great weight must be given to the description of the legatee as his wife. The whole description is applicable to the true wife except one Christian name. In *Drake* v. *Drake* (5) Lord Campbell pointed out that the rule that the name should prevail against an error of demonstration only applied when an error of demonstration was proved. Here "wife" was a perfectly accurate description of the respondent.

In *Thomas* v. *Thomas* (6), where the gift was held void for uncertainty, the parties lived in different places. *Adams* v. *Jones* (7) shows the importance attached to the use of the word "wife." The legacy in that case to the "wife" was held valid notwithstanding that the name was wrongly stated. In *Bradshaw* v. *Bradshaw* (8) it was held that in a competition between name and description the description prevailed.

[LORD HANWORTH M.R. referred to the rules of construction laid down by Lord Abinger in *Doe* v. *Hiscocks*. (9)]

(1) (1848) 5 C. B. 422.
(2) (1870) L. R. 10 Eq. 160.
(3) (1820) 3 B. & Ald. 632, 637.
(4) [1908] 1 Ch. 162.
(5) 8 H. L. C. 172, 179.
(6) (1796) 6 Term Rep. 671.
(7) 9 Hare, 485.
(8) 2 Y. & C. (Exch.) 72.
(9) (1839) 5 M. & W. 363, 367.

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Here the testator never really left his lawful wife. He was always in touch with her and contributed to her support and that of his children by her. The case is therefore distinguishable from *Lepine* v. *Bean* (1), where the testator had been living apart from his wife for twenty-five years and had never had any children by her.

LORD HANWORTH M.R. This appeal raises an interesting point upon the construction of the will of Arthur Smalley. The facts are simple. [His Lordship stated the facts as above set out and continued :] The words of the will are : "I give devise and bequeath unto my wife Eliza Ann Smalley all my possessions absolutely." The question is whom does the testator mean? It is obvious that the names Mary Ann will not fit the description, because the name Eliza cannot well be mistaken for Mary.

There have been many cases dealing with similar ambiguities. In *Lepine* v. *Bean* (1) a testator's gift to his children was held to be good and to apply to the children of a woman whom he had called his wife, although by his legal wife he had no issue. In *In re Wagstaff* (2) a gift by a testator to his "dear wife" was held to be a good gift, although in fact the woman's real husband was living, for it was held that the testator had used the word in a secondary sense, because there had been a bigamous marriage. Certain rules of construction were laid down in *Doe* v. *Hiscocks* (3), where Lord Abinger said : "The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements ;

(1) L. R. 10 Eq. 160. (2) [1908] 1 Ch. 162.
(3) (1839) 5 M. & W. 363, 367.

and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words. Again,—the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to shew the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language."

Now, applying those rules in the present case, under the first rule, we have the fact that for those in touch with the testator during the latter part of his life this woman, Eliza Ann Mercer, was in the position of his wife. She was looked upon as such by those who knew them, so that if the word "wife" can be used in a secondary sense, it might mean Eliza Ann Mercer. Now, on the second rule, there is evidence that the testator used to use the word "wife" as meaning Eliza Ann Mercer, and it seems clear that he did use the word in the sense that it was applicable, and meant to be applicable, to Eliza Ann Mercer. The question therefore is whom did he really intend to benefit under this gift to his "wife"?

I share the doubt expressed by Fry J. in *Garland* v. *Beverley* (1) as to the utility of the maxim "Veritas nominis tollit errorem demonstrationis," but, on the other hand, I think the rules laid down by Lord Abinger are most helpful. Here we have evidence that the testator was living with Eliza Ann Mercer, and that she was by repute considered to be his wife, and it is difficult to believe he would make a mistake in his wife's name. On the other hand, it is contended that the word "wife" prevents one from holding that Eliza Ann Mercer was intended. I do not think so. I think the word "wife" can be used in a secondary sense, and if so the addition of the word "Smalley" really means nothing at all, because

(1) (1878) 9 Ch. D. 213, 218.

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obviously Eliza Ann Mercer was living with the testator, and believed to be his wife, and so the word " Smalley " was simply part of the description, linked with the word " wife " to connote the person whom the testator wished to describe as his wife.

Looking at two other cases to which we have been referred, in *Doe* v. *Huthwaite* (1) the indication given by the name used was held to prevail, whereas in *Charter* v. *Charter* (2) it was held that certain evidence and certain directions in a will were enough to get over the incorrect description of a legatee by giving him a name to which he was not entitled.

Having regard to the rules to which I have referred, and to the uncertainty as to the sense in which the testator may have used the word " wife," I think that the construction of the testator's will least open to error is to say that he meant to indicate the person with whom he was living as his wife at the time of his death, Eliza Ann Mercer. I differ with regret from Eve J., but it is only fair to him to say that he had not the advantage of hearing several of the cases which have been cited to us. The appeal must be allowed and a declaration made that Eliza Ann Mercer is the person entitled to the benefit conferred by the testator's will.

LAWRENCE L.J. I agree. The question is whom did the testator intend to constitute universal legatee under his will. Neither claimant answers both to the name and to the description in the will. The plaintiff does not answer to the name " Eliza " ; the defendant, Mrs. Mercer, answers to that name, but not, strictly speaking, to the description " wife " or to the name " Smalley." Both answer to the name " Ann." The rest of the will affords no indication of intention and leaves the matter open. The true intention has, therefore, to be ascertained from the surrounding circumstances. The plaintiff was married to the testator in 1899, and there are four children of the marriage. The spouses lived together until

(1) 3 B. & Ald. 632 ; (1818) 8 Taunt. 306. (2) L. R. 7 H. L. 364, 381.

1910. After that date and until his death the testator never resided with his wife, who lived at various addresses in Burnley. In 1915 the testator obtained employment as a fish salesman with a firm of fish merchants in Smithfield Market, Manchester, and remained in their employ until his death. In 1924 he went through a form of marriage with the defendant Eliza Ann Mercer without informing her that his wife was still alive. From that time forward he lived with Eliza Ann Mercer as his wife.

In my opinion the facts of this case are practically indistinguishable from those in *Doe* v. *Rouse* (1), where a testator devised certain premises to his " dear wife Caroline." He had gone through a ceremony of marriage with her, but his real wife, Mary, was still alive. Maule J. said (2): " Caroline was de facto the testator's wife ; and she lived with him, as such, down to the time of his death. It is possible that the first marriage may not have been a valid one. At all events, if Mary was his lawful wife, all that can be said, is, that the testator had been guilty of bigamy. It is not the case of a description that is altogether inapplicable to the party, but of a description that is, in a popular sense, applicable. The competition is between one whom the testator clearly did mean, and another whom it is equally clear that he did not mean. Interpreting the language he has used, in its proper and legitimate manner, and regard being had to the circumstances existing at the time of the execution of the will, there can be no doubt that the intention of the testator is best effectuated by holding that "Caroline" is the person designated, and that apt words have been used to convey the property in question to her."

Mr. Spens contended that that case is distinguishable from the present on the ground that here the testator kept in touch with his lawful wife and made her an allowance. It is true that she visited him at Manchester, and that he visited her at Burnley, but it is important to note that he kept the knowledge of her existence from Eliza Ann Mercer. The outstanding facts are that the testator went through the

(1) 5 C. B. 422. (2) 5 C. B. 427.

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ceremony of marriage with Eliza Ann Mercer, and that, from that time until his death, she was reputed in the neighbourhood where they resided and amongst their friends and acquaintances to be his lawful wife. Then there are the facts deposed to by the two persons whom the testator named as executors in his will—namely, that they were fellow employees with the testator in the same firm; that Eliza Ann Mercer was known to them as the wife of the testator; that neither of them had heard that there was a lawful wife; that the testator came to them and with their assistance drew up the will, in which he described himself as of the place where to their knowledge he was then living with Eliza Ann Mercer. Thus the testator appointed these two friends of his executors to carry out the terms of his will, knowing that they believed that the person whom he described as his wife Eliza Ann Smalley was the defendant Eliza Ann Mercer. Moreover the testator seems to have handed the will to Eliza Ann Mercer, as she was the one to produce it after his death.

In my judgment the true inference to be drawn from these facts, coupled with the inherent improbability of the testator having by mistake called his lawful wife "Eliza" instead of "Mary," is that the testator by the expression "my wife Eliza Ann Smalley" intended to denote the defendant Eliza Ann Mercer, and that the description "wife" and the name "Smalley" are not sufficient to negative such an intention.

RUSSELL L.J. I am of the same opinion, and can state my reasons very briefly. I am entitled to construe this will with full knowledge of the affairs of the testator at the date of the will, and I ask myself "whom did the testator mean when he used the words 'unto my wife Eliza Ann Smalley'?" There are really four words of description: wife, Eliza, Ann and Smalley. Each of these four words applies to the appellant, either directly or by repute; whereas the word "Eliza" cannot by any reasoning be made to apply to the lawful wife. Knowing the circumstances that existed I have

no difficulty in coming to the conclusion that the testator intended to refer to Eliza Ann Mercer.

Appeal allowed.

Solicitors for appellant: *Emmet & Co., for Denis Hickey Manchester.*

Solicitors for respondent: *Adler & Perowne, for Creeke & Son, Burnley.*

W. I. C.

In re KIDNER.

KIDNER *v.* KIDNER.

[1928. K. 949.]

Company—Dividends and Interest on Debentures—Private Company—Family Agreement—Option to Trustee to purchase Shares and Debentures—Declaration of Dividend payable in three Instalments—Exercise of Option after Payment of first Instalment—Title to further Instalments and Debenture Interest.

By a contract made in April, 1922, it was agreed between the persons interested therein that a business forming part of a testator's estate should be converted into a private company with a capital of 30,000*l.*, divided into 20,000*l.* debentures bearing interest at 7 per cent. and 10,000 ordinary shares of 1*l.* each, fully paid, which were to be allotted to the trustees of the will. One of the trustees, F. K., was appointed manager of the company, and was given the option, so long as he continued to be both trustee and manager, of purchasing the whole of the debentures and shares at par value. In June, 1928, the company declared a dividend of 57½ per cent. on the ordinary shares for the year ending March 31, 1928, to be paid in three equal instalments on July 1 and November 1, 1928, and February 1, 1929, and the first instalment was paid on July 1, 1928.

On July 30, 1928, F. K. exercised his option to purchase the whole of the shares and debentures for 30,000*l.* At that date there was four months' interest due upon the debentures. The purchase was completed on November 5, 1928. On a summons being taken out to determine the rights of the parties in the unpaid instalments of the dividend, and the debenture interest, as between vendors and purchaser:—

Held, (1.) that the four months' accrued interest on the debentures passed to the purchaser, and (2.) that the declaration of the dividend on the shares having created a debt to the trustees as the then registered shareholders, the postponement of the payment did not operate to deprive them of their rights, and therefore the remaining instalments belonged to them and not to the purchaser.

ORIGINATING SUMMONS.

By an agreement dated April 29, 1922, and made between

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Edith Elizabeth Kidner of the first part, Edith Muriel Kidner of the second part, Elsie Irene Kidner of the third part and John Howard Terry and Frank Kidner of the fourth part reciting the will dated November 30, 1912, of George Augustus Kidner, who died on August 25, 1919, whereby the said J. H. Terry and F. Kidner were appointed trustees and executors, it was agreed that they should sell the business of a jobmaster and motor proprietor, which formed the bulk of the testator's estate, to a private company to be formed to take it over in consideration of 30,000*l.* to be paid and satisfied by the allotment to J. H. Terry and F. Kidner of 10,000 fully paid 1*l.* shares and 20,000*l.* debentures carrying interest at 7 per cent. per annum. Such shares and debentures were to be held by J. H. Terry and F. Kidner as trustees of the said will. F. Kidner was to be manager of the company. Clause 7 of the agreement was as follows: "The said Frank Kidner so long as he shall continue to fill the dual character of trustee of the will of the said George Augustus Kidner and manager of the said company shall have the option of purchasing at par the said 20,000*l.* debentures to be issued by the said company in such proportions (being multiples of 500*l.*) and at such time or times as he shall think fit and also when he shall have completed the purchase of the said debentures the further option of purchasing in manner aforesaid the said 10,000 shares at par."

The intended company was duly formed and registered on May 1, 1922, and the 10,000 shares of 1*l.* and twenty debentures of 1000*l.* each were duly allotted to the defendants. On June 13, 1928, a final dividend of 57½ per cent. was declared by the company for the financial year ending March 31, 1928, to be paid by three equal instalments—namely, on July 1, 1928, November 1, 1928, and February 1, 1929. The first instalment was duly paid to the executors of Elizabeth Kidner, the tenant for life under the will, who died on April 11, 1928.

On July 30, 1928, the said F. Kidner, who was then manager of the company and a trustee of the will of G. A. Kidner, exercised the option conferred upon him by the agreement and purchased the whole of the 10,000 shares

and 20,000*l.* debentures for 30,000*l.* The purchase was completed on November 5, 1928, but the payment was held over without prejudice to the questions raised by the summons, and the shares and debentures were transferred to the defendant F. Kidner. The summons raised the questions (1.) whether on the true construction of the agreement the defendant F. Kidner was entitled to receive the two unpaid instalments of the dividend of 57½ per cent. declared on the shares, or whether the dividends or any and what part thereof were payable to F. Kidner and J. H. Terry as trustees of the said will, and (2.) whether the interest on the 20,000*l.* debentures must be apportioned between the defendant F. Kidner and the estate of G. A. Kidner from the last payment down to the date of the exercise of the said option and such apportioned part paid to the trustees of G. A. Kidner's will, or how otherwise such interest should be dealt with.

Gavin Simonds K.C. and *Church* for the daughters of G. A. Kidner. The persons who held the shares when the dividends were declared are entitled to receive those dividends. They had already received the first instalment. The Articles of Association do not deal with the point, but it is referred to in Palmer's Company Forms, 11th ed., p. 768. Unless the purchaser has expressly stipulated that he is to receive it, a dividend declared before the purchase of shares belongs to the vendor. The transfer of shares does not pass a right to a dividend declared before the registration of the transfer, but a dividend declared after the purchase belongs to the purchaser: *Black* v. *Homersham.* (1)

Archer K.C. and *Cecil Turner* for the defendant F. Kidner. The remaining instalments of the dividend on the shares belong to the purchaser, not because of any delay in payment, but because there was no right to sue the company for payment until the dates when the instalments became payable, after the option was exercised. As to the debentures, the purchaser on exercising his option became entitled to the whole of the interest accrued due thereon since the last payment. The point is one that the parties have not provided for in the

(1) (1878) 4 Ex. D. 24.

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agreement. If anything the decision in *Black* v. *Homersham* (1) assists this contention.

E. F. Ball for the defendant Terry. Under clause 7 of the agreement the defendant Kidner's option to purchase the shares did not arise until after he had completed the purchase of the debentures, and that was not until November 5, 1928. Until that date there could be no alteration in the trustees' rights.

EVE J. By the agreement of April 29, 1922, arrangements were come to for the transfer of the business in which the testator's estate was largely interested, as were also his widow and two daughters as beneficiaries under his will, to a private company, in exchange for the issue to the trustees of 10,000 fully paid shares of 1*l.* and of debentures to the value of 20,000*l.*; and provisions were made for securing the services as manager of the company of a nephew of the testator who had been concerned in the management in the testator's lifetime, and the retention of whose services was obviously a matter of great importance to the estate and those interested therein. His remuneration was on a liberal scale, and there was reserved to him a right, so long as he fulfilled the dual capacity of a trustee of the testator's will and manager of the business, to acquire the whole of the shares and the whole of the debentures so issued to the trustees. That right is conferred upon him by para. 7 of the document, and circumstances have arisen in which Mr. Frank Kidner, the nephew in question, has seen right to exercise his option. He in fact exercised it on July 30, 1928, and was admittedly then ready and willing to pay the 30,000*l.*, the full price at which, under clause 7, the debentures and shares were to be transferred to him. But a question arose, whether the assignment of the debentures and the transfer of the shares were respectively to include the interest, some four months of it, at 7 per cent. on the debentures, and any, and if any, what part of a very substantial dividend on the shares declared by the company at a date antecedent to the contract but payable by instalments,

(1) (1878) 4 Ex. D. 24.

of which two remained unpaid at the date thereof. Unfortunately the parties have not been able to come to terms on these two points, and the purchase was completed at a much later date than July 30—namely, on November 5—by payment of the 30,000*l.*, and assignment and transfer of the debentures and shares, without prejudice to the questions which I am now called upon to determine.

It is obvious that Mr. Kidner was not to pay more than 30,000*l.*, and in consideration of that payment he was to obtain the assignment of the debentures and the transfer of the shares, but that does not dispose of the questions. The real question is what passed to the purchaser by the assignment and transfer made pursuant to that contract. In my opinion, so far as the debentures are concerned, the four months' accrued interest passed to the purchaser under the assignment, unless the Apportionment Act, 1870, could be held to apply, and I do not think it can. The contract is a contract to sell on any date the purchaser may elect in the exercise of his option; and the sale is to be at par, so that whatever advantages had accrued on the debentures down to the date of completion, appear to me to have passed to the purchaser by the assignment in consideration of the 20,000*l.*

With regard to the shares, the company's business year expired on March 31; and on June 13, 1928, a resolution was passed declaring a dividend of 57½ per cent. for the year ending on the previous March 31 and payable in three instalments, one on July 1, a second on November 1, and the third on February 1, 1929. It is not suggested that so much of that dividend as was payable and was in fact paid prior to the date of the contract, passed to the purchaser; but the purchaser contends that the right to the two subsequent payments passed by the transfer of the shares to him. I think that turns entirely on the determination of the question, what is the effect of the declaration of the dividend. It is to be remarked that under clause 6 of the agreement Mr. Frank Kidner was to receive as part of his remuneration the dividends declared in respect of 4900 shares

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so long as he remained the manager, and that immediately upon his ceasing to be the manager he was to lose any right to the shares or any dividends thereon. Assuming that the question had arisen under that clause and that Mr. Kidner had ceased to be manager after a dividend had been declared but before it was paid, it is, I think, clear that he would have been entitled to the dividend, his remuneration being all dividends "declared" not "declared and paid" in respect of the 4900 shares during his management. I think, although the point is not expressly dealt with in clause 7, the same rule ought to be applied in the case of these shares. The declaration of the dividend on June 13, 1928, created a debt owing by the company to the trustees as the registered shareholders. It is true that no steps could have been successfully taken to enforce payment until the due date for payment of each instalment arrived, but none the less the title to that dividend was in my opinion determined by the declaration, and the mere fact that the payment was postponed does not operate to deprive those who were the holders of the shares at the date of the declaration of their right to each instalment of that debt. I come to the conclusion therefore that the transfer did not vest in Mr. Kidner the right to claim and retain payment of the two last instalments of that dividend. That dividend remains where it was when it was declared, and belongs to the estate.

The result is that so far as the debentures are concerned he takes those without any further payment. So far as the shares are concerned, the vendors are entitled to the two further instalments of the dividend.

Solicitors: *Church, Rackham & Co.; Cooper, Bake, Fettes, Roche & Wade.*

H. L. L.

Approved. In re BAILEY [1951] 1 Ch. 467

In re GRAHAM.

GRAHAM *v.* GRAHAM.

[1928. G. 2065.]

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March 6, 13.

Will—Construction—Executory Gift—Gift to Husband, subject to Life Interests—Gift over to Husband's Children, "should he have predeceased my parents"—Death of Husband after Parents in Lifetime of Testatrix—Failure through Lapse—No Implication of Gift over in contrary Event.

By her will, after giving life interests to her parents, a testatrix devised and bequeathed her real and personal estate to her husband, but if he should have predeceased both her parents, then to her husband's children, whether by herself or his first wife. The husband survived both the parents, but predeceased the testatrix. The testatrix left no issue of her own, but at her death there were six children of her husband's first marriage living:—

Held, there was no implication of a gift over to those children on failure of the gift to the husband by lapse in any event, and therefore the residuary estate of the testatrix was undisposed of and passed to her next of kin.

ORIGINATING SUMMONS.

The testatrix, Ada Selina Frances Graham, widow, by her will executed in India and dated April 27, 1904, after appointing an executor and trustee, and reciting that both her parents and her husband were then alive, that she had then no children, but that her husband had seven children, naming them, by his first wife then living, devised and bequeathed her real and personal estate to her trustee upon trust for conversion and investment of the residue and to pay the income thereof to her parents during their joint lives and to the survivor of them during his or her life, and subject thereto in trust for her husband if living after their deaths. Should he, however, have predeceased both her parents, the trust fund was to be held in trust for such of her husband's children, whether by herself or by his first wife, living at her death, and such of his grandchildren then living and being children of any deceased child as should attain the age of twenty-one years or marry.

The testatrix died in 1928, having survived both her parents and her husband. Her mother died in 1909, her father in 1916, and her husband in 1926. She left no issue.

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At the date of her death six of her husband's children named in the will were living.

The trustee took out this summons to determine the question whether in the events which had happened the children of the husband of the testatrix living at her death were entitled to the residuary estate, or whether such estate was undisposed of by the will.

A. J. Belsham for the plaintiff.

R. W. Turnbull for the husband's children. The gift to the children is in effect subject to the husband's life interest, if any, and is not conditional on the husband predeceasing the parents of the testatrix. The present case is governed by *Jones* v. *Westcomb* (1), which lays down a principle which has been followed in other cases: *Avelyn* v. *Ward* (2); *Murray* v. *Jones* (3); *Maddison* v. *Chapman* (4); *Davies* v. *Davies* (5); *In re Shuckburgh's Settlement* (6); Jarman on Wills, 6th ed., p. 2195.

L. F. Potts for the next of kin. The gift in question is clear and unambiguous. The Court will not make a new will for the testator. The principle of *Jones* v. *Westcomb* (1) does not apply where the prior donee satisfies the conditions of the gift during the lifetime of the testator.

[EVE J. The testatrix knew in 1909 that her husband could not have predeceased both her parents.]

After the death of the mother in 1909, the gift over could not take effect. The husband's children cannot take unless it is clear on the face of the will that the gift to them is subject to prior life interests in any event, and not merely in the event mentioned. Here the gift to the husband failed by lapse, and the event on which the children are to take has not happened: *Brookman* v. *Smith* (7); *Doo* v. *Brabant.* (8) In *Wing* v. *Angrave* (9), the case of commorientes, a husband

(1) (1711) Prec. Ch. 316.
(2) (1749) 1 Ves. Sr. 420.
(3) (1813) 2 V. & B. 313.
(4) (1858) 4 K. & J. 709.
(5) (1882) 30 W. R. 518; 47 L. T. 40.
(6) [1901] 2 Ch. 794, 798.
(7) (1872) L. R. 7 Ex. 271.
(8) (1791) 3 Bro. C. C. 393.
(9) (1860) 8 H. L. C. 183.

and wife made mutual wills in favour of each other, with a gift over in the event of either dying in the other's lifetime. Both having perished in the same calamity it became impossible to prove that either predeceased the other, therefore the gifts failed, because the events on which they were to take effect could not be proved to have happened, and there was an intestacy in each case. No point could be made from the recitals as to the state of the family. Here the exact opposite has happened to the event specified in the will.

[He also referred to *Calthorpe* v. *Gough* (1); *Humberstone* v. *Stanton* (2); *In re Tredwell* (3); *In re Edwards.* (4)]

Turnbull replied.

Cur. adv. vult.

March 13. EVE J. By her will, dated April 27, 1904, after appointing her father, Caleb Kennelly, to be her executor and trustee, and stating that, at the date of her said will, she had no children, but that both her parents and her husband, James Graham, were alive and that her husband had, by his former marriage, seven children, Ada Alice, Frank, Herbert, Harry, Hilda, Fred and Rennil then living, testatrix devised, appointed and bequeathed her residuary real and personal estate to her said trustee, upon trust for conversion as therein mentioned, and after payment thereout of her funeral and testamentary expenses, upon trust to invest the clear residue and to pay the income thereof to her parents during their joint lives, and, on the death of either, to the survivor, and thereafter the will continued as follows: "That after the death of my father, his executor or administrator shall pay the whole of the income of my trust fund to my mother, should she be living at his death, but in case she happen to have predeceased my father, my father's executor or administrator shall hold the trust fund in trust for my husband, Mr. James Graham, who will be absolutely entitled to the whole of the trust fund. Should he, however, have predeceased both my parents the trust fund shall be held in trust for such of my husband's children, whether by me or by his

(1) (1789) 3 Bro. C. C. 394*n*.
(2) (1813) 1 V. & B. 385.
(3) [1891] 2 Ch. 640.
(4) [1906] 1 Ch. 570.

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first wife living at my death and such of his grandchildren living at my death and being children of any then deceased child of my husband entitled under this my will as being male attain the age of 21 years or being female attain that age or marry in equal shares per stirpes." The mother of the testatrix died in 1909, her father died in 1916, and her husband in 1926. She herself died in 1928. Had the husband survived the testatrix, he would have taken an indefeasible interest, the failure of the prior gift—the gift to him—is due to lapse only.

The six of the husband's seven children who survived the testatrix claim that the executory gift takes effect, although the event that has happened is the exact opposite of that in which the substituted gift is dependent, and in support of their claim they rely on the line of authorities, of which *Jones* v. *Westcomb* (1) is the leading case. But have these authorities, which proceed on the doctrine that the events, on which the gift over was to come into operation, was an event implied, if not expressly indicated, by the language of the will, any application to a case like the present, where the failure of the prior gift is due to lapse by the death of the donee in the lifetime of the testatrix? I think not. The husband had satisfied the condition of the gift in the lifetime of the testatrix, and she cannot be supposed to have contemplated the failure of the gift to him by lapse. She presumed, as every testatrix does, that the persons who were to take under her will would survive her. The case falls within the decisions of *Calthorpe* v. *Gough* (2); *Doo* v. *Brabant* (3); *Tarbuck* v. *Tarbuck* (4); *Brookman* v. *Smith* (5); and *Humberstone* v. *Stanton* (6); and the testatrix died intestate as to her residuary estate. The costs of all parties, taxed as between solicitor and client, will be paid thereout.

Solicitors: *Lempriere & Hunter, for R. Hudson, Accrington*
Gamlen, Bowerman & Forward.

(1) (1711) Prec. Ch. 316.
(2) (1789) 3 Bro. C. C. 394*n*.
(3) 3 Bro. C. C. 393.
(4) (1834) 4 L. J. (N. S.) Ch. 129.
(5) L. R. 7 Ex. 271.
(6) (1813) 1 V. & B. 385.

H. L. L.

In re COCKERILL.

MACKANESS *v.* PERCIVAL.

EVE J.
1929
March 12, 22.

[1928. C. 4669.]

Will—Restraint on Alienation—Devise subject to Condition—Land to be offered for Sale to Charity at Price below real Value—Offer and Sale in Accordance with Condition—Incidence of Death Duties—Condition repugnant and void—Charity not liable to Duty.

A testator, by his will, devised land to P. subject to the payment of certain annuities, of road-making charges for which the testator was liable, and of estate and other death duties, and subject also to the proviso that if within twenty years of the testator's death P. should desire to sell the land, he was to give the Governors of the N. Grammar School the option of purchasing the land at the price of 300*l.* an acre, such offer to be subject to the payment by the Governors of the said annuities and road charges, and acceptance to be notified within three months.

The land, of about 22 acres in area, was in fact worth 670*l.* an acre at the date of the testator's death. In accordance with the condition P. offered it to the School Governors at 300*l.* an acre, and the offer was duly accepted and the land sold and conveyed to the Governors for 6688*l.* The value of the land for the purposes of death duties was assessed at 14,720*l.*

On a summons being taken out to determine whether the Governors were liable to pay a rateable proportion of the estate and succession duties levied upon the value of the property:—

Held, (1.) that the Governors having acquired the land, not under any disposition by the testator, but by the voluntary act of P. in selling instead of retaining the property, took no benefit under the testator's will; (2.) that they acquired the land expressly subject to annuities and road-making charges, but impliedly free from any charge for death duties; and (3.) the condition being one in restraint of alienation except to a particular purchaser was void for repugnancy, and not binding upon the devisee. The death duties payable must therefore be borne entirely by P., the devisee.

Muschamp v. *Bluet* (1617) Sir J. Bridg. 132 and *In re Rosher* (1884) 26 Ch. D. 801 applied and followed.

ORIGINATING SUMMONS.

The facts, as stated by the learned judge in his judgment, were as follows:—

"By his will dated November 6, 1926, the testator, Alfred Cockerill, after bequeathing life annuities of 1*l.*, 10*s.*, and 10*s.* per week free of duty to his niece Elizabeth Whiting,

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John Braun, and Thomas Chapman respectively, and declaring that such annuities should be charged on and payable out of the land containing about 25 acres (after deducting therefrom the portions therein mentioned) which was adjacent or near to his dwelling-house, devised the said 25 acres of land to the use of the defendant, John Percival, absolutely subject to and charged with the payment of the said annuities, and also with the payment of any outstanding charges to which he (the testator) might be liable for making or completing one-half of the road known as Park Avenue South, and also with the payment of all estate and other death duties that might be payable on his death in respect of the said 25 acres. And testator declared that the above mentioned devise was made on the condition that if the said John Percival, or his personal representatives, should be desirous of selling the land within twenty years from the date of the death of the testator, he or they should, before doing so, give to the Governors for the time being of the Northampton Old Grammar School Foundation the option of purchasing the 25 acres at the price of 300*l.* per acre, such offer to be subject to the payment by the said Governors of the said annuities and road-making charges, and that if the said Governors accepted the offer they should notify the same in writing to the defendant, John Percival, within three months after such offer should have been made.

The testator died on September 9, 1927. The 25 acres were found on admeasurement to be 22·293 acres and were in fact of much greater value than 300*l.* per acre, being of the value of 670*l.* an acre or thereabouts. The agreed value thereof for the purpose of estate and succession duties was the sum of 14,720*l.* 15*s.*, subject to the annuities, and after deducting the sum of 1279*l.* 5*s.*, the apportioned amount of road-making charges payable by the testator.

On January 16, 1928, the devisee, being desirous of selling the land, in accordance with the condition, offered it to the Governors of the School Foundation and they accepted the offer on March 10 following. It was conveyed to them on October 15, 1928, at the price of 6688*l.* Estate and succession

duties have been assessed on the value of the land at 22½ per cent. and 10 per cent. respectively, and this summons has been issued for the purpose of determining whether the whole of such duties falls to be paid by the devisee or whether a rateable proportion thereof, representing the duties on the excess value over 300*l.* per acre, ought to be borne and paid by the Governors."

W. F. Waite for the plaintiffs.

Danckwerts for the defendant Percival. The School Governors took a benefit under the testator's will, and they are bound to pay a rateable proportion of the estate and succession duties payable on the value of the land under the Finance Act, 1894, s. 14. The will contains no express provision to the contrary: *In re Hacket* (1); *In re Jolley.* (2)

J. A. Reid for the School Governors. The school took nothing under the will. The defendant Percival was not bound to sell the land to the Governors or to any one else, and the sale was his own voluntary act. The option to purchase was expressly subject to the annuities and the charge for making up roads on the property, but there is no charge for estate or succession duty except in the hands of the devisee. The inference is that the testator intended all death duties to be borne by the devisee.

Finally, the condition is repugnant and void as imposing a restraint upon alienation not binding on the devisee. The restraint is not limited, as in *In re Macleay* (3), but general, as it forbids alienation during a period of years except to one particular body of persons: *In re Rosher.* (4) For these reasons, the School Governors are not liable to pay any proportion of the duties.

Danckwerts replied.

Cur. adv. vult.

March 22. EVE J. [after stating the facts as above:] There are, I think, three grounds upon which the School Governors

(1) [1907] 1 Ch. 385.
(2) (1901) 17 T. L. R. 244.
(3) (1875) L. R. 20 Eq. 186.
(4) (1884) 26 Ch. D. 801.

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can rely in answer to the devisee's claim to fix them with liability in respect of these duties. In the first place, they take nothing under the testator's will. They have not acquired the land at the price they paid for it by reason of any option given to them by the testator, but by the voluntary act of the devisee in electing to dispose of the land instead of retaining it, and I see no ground for charging them as beneficiaries under the will with a proportion of the duties. In the next place, the testator has, in my opinion, disclosed a clear intention to impose these duties on the devisee. By the devise he expressly charges the land with the payment of the three annuities, the road-making charges and "all estate and any other death duties that may be payable on my death in respect of the 25 acres"; but by the terms of the condition the land is to be offered to the Governors at the price of 300*l.* per acre, and subject to the payment of the annuities and road-making charges only. The omission of any mention of the estate and other death duties can only be regarded as indicative of the testator's intention that the purchasers were not to be subjected to any liability in respect thereof.

And, finally, there is the view contended for by Mr. Reid, that this condition is altogether void for repugnancy, and that the devisee was not under any obligation to offer the land to the School Trustees, but could have sold it without so doing and retained as his own the full price obtained for it.

That the condition operates as a restriction on alienation cannot be questioned, and prima facie it is void on that ground; but inasmuch as there are cases in which partial restrictions have been held not to avoid the condition (*Doe* d. *Gill* v. *Pearson* (1) and *In re Macleay* (2)), it is necessary to examine the condition carefully and to appreciate its effect. It is limited in this case in its operation to a period of twenty years from the testator's death, and it operates only against alienation by sale, but it imposes a limit on the price which, in substance, compels the devisee during the period of restriction to sell to one purchaser only, for I am not going to assume that the purchaser indicated, and not

(1) (1805) 6 East, 173. (2) (1875) L. R. 20 Eq. 186.

the less so because in this case he happens to be a trustee for others, would refuse the offer of acquiring for 6600*l.* something which he could immediately resell for more than double the price paid. The devisee in this case is not restrained from selling to a particular person, but from selling it to anybody but a particular person, and this, in my opinion, creates a state of facts not to be found in any reported case in which a condition imposing partial restraint has been treated as an exception to the general rule that "the owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit": see per Chitty J. in *In re Elliot.* (1)

The conclusion at which I have arrived, that this condition is repugnant and void, is in accordance with the decisions in *Muschamp* v. *Bluet* (2) and in *In re Rosher.* (3)

In the former of these two cases the devise and condition were as follows: "And as touching my lands at Tottenham my son, Matthew, is joint purchaser with me of the most and the rest of all my houses and land there which is freehold, I give to Henry and Michael Lock upon this condition, that if they shall sell it to any man but to Matthew Lock, my son, then he to enter upon it as of my gift by this my Will." This was held to be void on the ground that to "restrain generally and that he shall alien to none but one" is the same thing.

In *In re Rosher* (3), where the proviso attached to the devise of an estate worth 15,000*l.* at the testator's death was that if the devisee, or any person claiming through or under him, desired to sell in the lifetime of the testator's widow, she was to have the option of purchasing for 3000*l.* Pearson J. held—after an exhaustive examination of all the authorities—that the proviso amounted to an absolute restraint on alienation during the widow's lifetime, that it was void in law, and that the devisee was entitled to sell the estate as he pleased without first offering it to the widow at 3000*l.* The result is that I must answer the questions propounded in the summons by declaring that the death duties payable

(1) [1896] 2 Ch. 353, 356. (2) (1617) Sir J. Bridg. 132, 133.
(3) 26 Ch. D. 801.

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in respect of the land in question must be borne by the defendant, John Percival.

If anybody wishes the order to include more, I am prepared to make a declaration that the condition attached to the devise is void, and that the devisee was entitled to sell the land devised to him (if such had been his pleasure) without first offering it to the School Governors. The costs of all parties will be taxed as between solicitor and client, and paid out of the estate.

Solicitors: *Samuel Price, Sons & Robertson, for Markham & Cove, Northampton; Deacon & Co., for Browne & Wells, Northampton.*

H. L. L.

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March 8.

In re HOPE'S WILL TRUST.

HOPE *v.* THORP.

[1928. H. 3821.]

Will—Settled Chattels—Attempt to create entailed Interest therein—Death of Testator before 1926*—Vested in Tenant in tail absolutely—Trustees authorized by Court to sell—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 130*—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 57.

Under the Law of Property Act, 1925, s. 130, the power to create an entailed interest in personal estate can be exercised by will only in the case of a testator who dies after the commencement of the Act.

Therefore, where a testator, who died in 1912, by his will settled certain chattels including three family portraits to be held upon trusts which should as nearly as the rules of law and equity permitted correspond with the limitations of real estate in tail, and set out such limitations at length, but settled no real estate upon the same limitations:—

Held, that the testator had attempted to create an entailed interest in the chattels but had not succeeded, and therefore the trustees of his will had no power to sell them under s. 130, sub-s. 5. But the Court, deeming it in the circumstances expedient, would make an order authorizing the sale of the portraits by the trustees under the Trustee Act, 1925, s. 57.

ORIGINATING SUMMONS.

The testator, Charles Hope, by his will dated May 13, 1902, appointed the plaintiff and two other persons named to be

executors and trustees thereof, and devised and bequeathed all his real and personal estate to his trustees upon certain trusts as to the following articles and personal effects—namely, all silver and silver plate, a collection of letters and autographs, three family portraits, all family prints and engravings, a mull formed of a ram's horn, and a case of war medals, that was to say upon such trusts as should, as nearly as the rules of law and equity would permit, correspond with limitations of freehold estate to the effect following, to the use of the testator's eldest son, the plaintiff, during his life, with remainder to the use of his first and other sons successively in tail male, with remainders over to the use of the testator's other sons and their issue successively in tail male, and his daughters and their issue in tail, in strict settlement. The testator directed his trustees to hold all the residue of his real and personal estate upon trust for conversion, and after payment thereout of debts, funeral and testamentary expenses, duties and legacies, to hold the net residue upon the trusts thereinafter directed. The testator left no real estate settled upon the same trusts as the above mentioned chattels.

The testator died on December 2, 1912, and his will and two codicils, which did not affect the settlement of the chattels, were duly proved. He left three sons and four daughters surviving him. The plaintiff was married, and his eldest son who, if an entailed interest were created in the chattels mentioned, would have been tenant in tail, was an infant.

The value of the personal chattels so settled by the will, apart from the three family portraits, was about 800*l.* The portraits, which were by Hoppner, Raeburn and Angelica Kauffmann respectively, were valued at 1000*l.*, 900*l.* and 350*l.*, a total of 2250*l.*

The trustees, who, with the consent of the tenant for life, desired to sell the family portraits, took out this summons to determine the question whether they had power with such consent, under s. 130 of the Law of Property Act, 1925, or otherwise to sell the chattels settled by the will; and if they had no such power, whether the Court would authorize them to sell the said chattels, and in particular the three family portraits.

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By the Law of Property Act, 1925, s. 130: "(1.) An interest in tail or in tail male or in tail female or in tail special (in this Act referred to as 'an entailed interest') may be created by way of trust in any property, real or personal, but only by the like expressions as those by which before the commencement of this Act a similar estate tail could have been created by deed (not being an executory instrument) in freehold land, and with the like results, including the right to bar the entail either absolutely or so as to create an interest equivalent to a base fee, and accordingly all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property.

* * * * * *

(2.) Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.

* * * * * *

(5.) Where personal chattels are settled without reference to settled land on trusts creating entailed interests therein, the trustees, with the consent of the usufructuary for the time being if of full age, may sell the chattels or any of them, and the net proceeds of any such sale shall be held in trust for and shall go to the same persons successively, in the same manner and for the same interests, as the chattels sold would have been held and gone if they had not been sold, and the income of investments representing such proceeds of sale shall be applied accordingly.

(6.) An entailed interest shall only be capable of being created by a settlement of real or personal property or the

proceeds of sale thereof (including the will of a person dying after the commencement of this Act), or by an agreement for a settlement in which the trusts to affect the property are sufficiently declared."

By the Trustee Act, 1925, s. 57: "(1.) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the Court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2.) The Court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3.) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

(4.) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

Edward Beaumont for the plaintiff, the tenant for life of the settled chattels, and one of the trustees of the will. The question is whether s. 130 of the Law of Property Act, 1925, is applicable to the present case. The trustees can sell the chattels under sub-s. 5 if an entailed interest was created therein. The testator attempted to create such an entailed interest, but he died before the Act came into force. If there were any settled land s. 78 of the Settled Land Act, 1925, would apply to the settlement of personal property upon the same trusts as that of the land, but here there is no land

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settled upon the same trusts as these chattels. If the trustees have no power of sale the Court can authorize a sale under the Trustee Act, 1925, s. 57.

W. A. Peck for the remaining trustees and beneficiaries. There is no entailed interest created in the chattels, and s. 130 does not apply, as the testator died before the Act came into force. But there being no other power of sale the Court has power under s. 57 of the Trustee Act, 1925, if it should deem it expedient, to authorize the trustees to sell these heirlooms. The evidence filed shows the expediency of the sale in the present circumstances. An offer has been accepted for them and minutes of an order have been drawn authorizing the sale, with the consent of the tenant for life, under s. 57, at a price exceeding the valuation.

EVE J. The summons raises a question whether the trustees of the testator's will have power to sell chattels settled by the will, and assuming that they have not such a power it asks that they may be empowered so to do by virtue of s. 57 of the Trustee Act. Having come to the clear conclusion that the sale is one which will be beneficial to all parties interested, and indeed is almost unavoidable, I find no difficulty in authorizing the trustees to carry it out under s. 57; but inasmuch as counsel have been good enough to argue the question whether or no in the circumstances of this case, and in the events which have happened, there is a power under s. 130 of the Law of Property Act vested in the trustees to effect the sale, I think I ought to express my opinion thereon.

By s. 130 it is provided that an interest in tail, referred to as an entailed interest, may be created by way of trust in any property real or personal, but only by the like expressions as those by which, before the commencement of the Act, a similar estate tail could be created by deed in freehold land, and so on. No one can read the testator's will, which is very elaborate, without seeing that he has in fact attempted to create an estate tail in certain chattels, but there is no settled real estate. It is an attempt to create an estate tail in chattels by appropriate language, but the

result is not what the testator intended. The chattels in the event which has happened, his death before the coming into operation of the Act, would be vested absolutely in the person who he contemplated would be the first tenant in tail. It is suggested, however, that under this section the powers which the trustees would undoubtedly have possessed, had the testator died subsequent to the Act, are available with respect to these chattels. The sub-section of s. 130 relied upon is sub-s. 5: "Where personal chattels are settled without reference to settled land"—that is the case here—"on trusts creating entailed interests therein, the trustees, with the consent of the usufructuary for the time being if of full age, may sell the chattels or any of them," and then it goes on to deal with what is to be done with the proceeds. The suggestion is that these chattels are settled without reference to settled land on trusts creating entailed interests therein, and would seem to fall within that sub-section. But one must go on and read sub-s. 6: "An entailed interest shall only be capable of being created by a settlement of real or personal property or the proceeds of sale thereof (including the will of a person dying after the commencement of this Act)." But the fact is there was no entailed interest created in the chattels. Had the testator died after January 1, 1926, the result would have been different; but in the event which happened his attempt to create an entailed interest is not effectual.

In these circumstances, I do not think the trustees have any power under this section to sell the chattels. The order will be, according to the minutes as drawn, that the trustees other than the plaintiff, not being less than two in number, may with the consent of the plaintiff sell the three portraits referred to in the summons for a sum to be mentioned in a document to be initialled and retained by the Master, with liberty to apply. The costs of all parties as between solicitor and client will be paid out of the proceeds of the property sold.

Solicitors: *Saxton & Morgan, for Dickson, Archer & Thorp, Alnwick.*

H. L. L.

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March 12.

IVEAGH *v.* HARRIS.

[1928. I. 2702.]

Landlord and Tenant—Breach of restrictive Covenant—Power of Re-entry—Action to recover Land—Application for Leave to apply to Authority to discharge or modify Restriction—"Action . . . . to enforce a restrictive Covenant" — Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 84, *sub-ss.* 1, 9, 12.

An action by a reversioner to recover possession of leasehold land, under a power of re-entry, for breach of a restrictive covenant contained in the lease is not a "proceeding by action . . . . to enforce a restrictive covenant" within sub-s. 9 of s. 84 of the Law of Property Act, 1925.

The Court therefore will not stay such an action to enable the defendant to apply to the authority referred to in the section for an order modifying or discharging the restriction which is the subject of the action.

PROCEDURE SUMMONS.

By a lease dated July 7, 1873, and made between William Lord Kensington, the freehold owner of the one part, and Leonard Cousling of the other part, a dwelling-house, No. 29 Kempsford Gardens, Kensington, was demised to the lessee for the term of ninety-four years from June 24, 1872, at the yearly ground rent of 6*l.* after the first year of the term. The lease contained a covenant on the part of the lessee for himself, his heirs, executors, administrators, and assigns that the lessee would not without the licence or consent in writing of the said Lord Kensington, his heirs or assigns, or the person or persons entitled to the reversion of the premises immediately expectant upon the determination of the term, allow the said premises to be occupied or used otherwise than as a private dwelling-house. The lease contained the usual proviso for re-entry in case of any breach of any covenant contained therein.

By deed dated May 21, 1903, the freehold reversion in the premises was by persons claiming under William Lord Kensington conveyed with other property for value to Edward Cecil Baron Iveagh (afterwards Earl of Iveagh) in fee simple subject to but with the benefit of the said lease.

The Earl of Iveagh died on October 7, 1927, and the plaintiffs were the trustees of his will, by which the fee

simple in the premises was devised unto them in trust for sale. On December 8, 1927, and since that date the leasehold premises were vested in the defendant for the residue of the term granted by the lease.

The plaintiffs alleged that the defendant had without the licence or consent in writing of Lord Iveagh or of the plaintiffs sub-let parts of the premises to different persons in separate and distinct tenements, and had thereby allowed the premises to be occupied otherwise than as a private dwelling-house.

On December 8, 1927, the plaintiffs served on the defendant a notice stating that the user of the said premises as several separate and distinct tenements was a breach of the covenant not to occupy the premises otherwise than as a private dwelling-house, and requiring the defendant to remedy the breach within six calendar months from the date of the notice and to make compensation in money. The defendant (it was alleged) had not within the prescribed period remedied the breach, and had not done so at the date of the issue of the writ, nor had she offered or paid any compensation. The plaintiffs thereupon brought this action claiming: (1.) recovery of possession of the premises, and (2.) mesne profits until delivery of possession.

The defendant took out this summons asking for leave to make an application under s. 84 of the Law of Property Act, 1925 (1), and for an order staying the proceedings in the action in the meantime.

(1) The Law of Property Act, 1925, provides by s. 84:—

"(1.) The Authority hereinafter defined shall (without prejudice to any concurrent jurisdiction of the Court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied—

(*a*) that by reason of changes in the character of the property or of the neighbourhood or other circumstances of the case which the Authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land

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G. D. Johnston for the defendant. The action, though in form one for recovery of land, is really an action to enforce a restrictive covenant. The weapon of re-entry is quite as effectual as an application for an injunction. There has been such a departure from the original conditions of the neighbourhood at the time the lease was granted that the restriction ought to be deemed obsolete. Relief can only be granted in a case like the present under s. 84, for the power of the Court under s. 146 to relieve against forfeiture for breach of covenant, by sub-s. 8 of that section does not extend to a covenant against assigning or underletting the property.

Fergus D. Morton K.C. for the plaintiffs. The present application does not come within s. 84. The action is not brought to enforce a restrictive covenant but to recover possession of a dwelling-house under a power of re-entry for breach of covenant. The language of the section is quite different from that of s. 146, sub-s. 2, under which the lessee may apply for relief "where the lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture." In *Agnew* v. *Usher* (1) the Court held that an action for non-payment of rent was not an action to "enforce" a contract for the purposes of service of the writ out of the jurisdiction under Order XI., r. 1. That case was distinguished in *Kaye* v. *Sutherland* (2), where an action to recover

> for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user.
>
> . . . . . .
>
> (9.) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the Court for an order giving leave to apply to the Authority under this section, and staying the proceedings in the meantime.
>
> (10.) In this section "the Authority" means such one or more of the Official Arbitrators appointed for the purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919, as may be selected by the Reference Committee under that Act.
>
> . . . . . .
>
> (12.) Where a term of more than seventy years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of fifty years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied had the land been freehold." . . . .
>
> (1) (1884) 14 Q. B. D. 78.
>
> (2) [1888] 20 Q. B. D. 147, 151.

compensation for tenant right, due by custom, was held to be within the rule. The language of s. 84 should not be extended to actions for recovery of land.

Johnston in reply referred to *Feilden* v. *Byrne*. (1)

EVE J. This is an application by the defendant in an action to recover possession of a leasehold messuage for breaches of covenant, that she be at liberty to proceed with an application which has already been made under s. 84 of the Law of Property Act, 1925, for an order modifying the restrictive covenants in the lease, and that the action may be stayed pending the hearing of the application.

The whole point is whether the action is a proceeding by action or otherwise to enforce the restrictive covenants. It was instituted on November 20 last. Notice had been served upon the defendant requiring her to remedy certain alleged breaches of covenant, and that notice had not been complied with. The lease under which the defendant holds contains a proviso for re-entry in case there is a breach of any covenant contained in the lease, and the remedy sought by the action is not an injunction to restrain any continued breach of covenant, but recovery of possession of the premises and mesne profits from the date of the issue of the writ until possession. The question is, is the plaintiff in that action proceeding by action or otherwise to enforce a restrictive covenant? I do not think he is. An action to enforce the covenant is an action wherein the plaintiff's claim would be for an injunction to restrain further breaches of covenant. An action to recover possession for subsisting breaches cannot in my opinion be properly described as one to enforce the covenants. It is an action to re-enter and recover possession.

In these circumstances I do not think the case is within sub-s. 9. The defendant is not entitled to the relief she asks, and there will be no order upon the summons except that the costs will be the plaintiff's in any event.

Solicitors: *Arthur E. Burton; Travers Smith, Braithwaite & Co.*

(1) [1926] Ch. 620.

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1929
April 12.

In re A DEBTOR.

[No. 76 of 1929.]

Bankruptcy—"Final order"—Decree nisi for Dissolution of Marriage—Order for Payment by Co-respondent to Petitioner's Solicitors on their undertaking to lodge in Court—Bankruptcy Notice issued by Solicitors—Petition—"Creditors"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*g*); *s.* 4.

An order of the Divorce Court directing payment by the co-respondent to the solicitors of the petitioner of his costs of the suit on their undertaking to lodge in Court any sums recovered under the order is not a "final order" within s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, upon which a bankruptcy notice against the co-respondent can be based.

Ex parte Muirhead (1876) 2 Ch. D. 22; *In re Binstead* [1893] 1 Q. B. 199 applied.

Semble per Lord Hanworth M.R. The solicitors in such a case are not "creditors" within s. 4 of the Act who can present a petition in bankruptcy.

Ex parte Arkell (1889) 61 L. T. 90 considered.

Appeal from a receiving order made by Mr. Registrar Francke.

On April 30, 1928, a decree nisi was made in a divorce suit in which the debtor was the co-respondent.

On July 11, 1928, the debtor was ordered to pay into Court the amount of the petitioner's costs of the suit, which had been taxed at 67*l.* 1*s.* 9*d.*

On October 24, 1928, an order was made varying the order of July 11 by directing that the debtor should pay the 67*l.* 1*s.* 9*d.* to the petitioner's solicitors on their undertaking to lodge the sum in Court when received. On October 26 the solicitors gave the required undertaking to the registrar. On November 5 the decree nisi was made absolute. On January 2, 1929, a bankruptcy notice was issued by the solicitors against the debtor for payment to them of the 67*l.* 1*s.* 9*d.* The debtor did not comply with the bankruptcy notice, and accordingly on January 22 the solicitors presented the present bankruptcy petition.

At the hearing before the registrar on February 20, 1929, it was objected on behalf of the debtor that the bankruptcy

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notice was bad on the grounds: (1.) That solicitors were not "creditors" of the debtor within s. 4 of the Bankruptcy Act, 1914; and (2.) that the order of October 24, 1928, was not a "final order" within s. 1, sub-s. 1 (*g*), of the Act.

The registrar in making the receiving order said: "I hold that the order on which the bankruptcy notice in this case was issued is a final order inasmuch as it is a final adjudication as to the amount of costs to be paid by the debtor as co-respondent in proceedings in the Divorce Court. The order directs the debtor to pay such costs to Messrs. H. L. Lumley & Co., who are consequently the only persons entitled to enforce the order. Therefore by reason of the provisions of s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, they, being the persons entitled to enforce the order, must be deemed to be creditors who have obtained a final order."

The debtor appealed. The appeal was heard on April 12, 1929.

W. N. Stable for the debtor. In order to constitute a good bankruptcy petition within s. 4 of the Bankruptcy Act, 1914, there must be a "debt owing by the debtor to the petitioning creditor." Here there was no such debt. The solicitors to whom by the order of October 24 the costs were ordered to be paid were not "creditors" of the debtor, but a mere conduit pipe to receive the money for the person who should ultimately be entitled to it.

[LAWRENCE L.J. To whom do you say that the debt is owing?]

To the husband. There never was any debt owing by the debtor to the solicitors. The whole of these proceedings are misconceived. *Ex parte Muirhead* (1) is almost conclusive on the point. The registrar distinguished that case on the ground that there the debt was in respect of damages and not costs.

[LORD HANWORTH M.R. referred to *Gundry* v. *Sainsbury*. (2)]

A receiver cannot present a bankruptcy petition, as he is not a creditor but only a person appointed to receive.

(1) 2 Ch. D. 22. (2) [1910] 1 K. B. 645.

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A similar point to that in the present case arose in *Ex parte Jones* (1) on a judgment summons taken out by a solicitor in his own name to enforce payment of costs which had been ordered to be paid to him as solicitor of a petitioner in a divorce suit. The summons was dismissed by Phillimore J.

Further, the order of October 24, 1928, was not a "final order" within s. 1, sub-s. 1 (*g*), of the Act: *In re Binstead.* (2) In that case the co-respondent in a divorce suit had been ordered to pay the petitioner's costs and failed to comply with the order, and it was held that there had not, within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, been a "final judgment" for the amount, and that the petitioner could not issue a bankruptcy notice against the co-respondent in respect of it. The present section (s. 1, sub-s. 1) is wider in its terms than s. 4, sub-s. 1, of the Act of 1883, and includes both a "final judgment" and "final order."

Tindale Davis for the petitioning creditors. The judgment of the registrar was right. "Creditor" is defined by s. 1, sub-s. 1 (*g*), as "any person who is, for the time being, entitled to enforce a final judgment or final order." The only persons entitled to enforce the order of October 24, as drawn up, are the solicitors. The direction is to pay to them and no one else. They are therefore "creditors" who under s. 4 of the Act can present a bankruptcy petition.

Ex parte Arkell (3) is a clear decision that the only persons who can enforce the order of October 24 are the persons to whom payment is ordered to be made.

The definition of "creditor" in s. 1, sub-s. 1 (*g*), makes it clear that the only persons who can petition are the solicitors. If this were not so there would be two persons who could issue execution, the petitioner in the divorce suit and the solicitors to whom the costs were ordered to be paid.

[LAWRENCE L.J. The order of October 24 is nothing more than the appointment of receivers to get the money into Court.]

(1) [1913] W. N. 263. (2) [1893] 1 Q. B. 199.
(3) 61 L. T. 90.

The order would be nugatory unless the persons to whom payment is directed to be made can enforce it.

[He also referred on this point to *Ex parte Rayner.* (1)]

Then as to whether the order of October 24 is a final order within s. 1, sub-s. 1 (*g*), of the Act. It is submitted that the decree nisi having been made absolute, the order is now in effect a final order: *In re A Debtor.* (2) It finally determines the rights of the parties as to the costs ordered to be paid. Nothing further remains to be done under the order.

[LAWRENCE L.J. It was an interim direction for payment made for the benefit of the person to whom the costs should ultimately be held to belong.]

A bankruptcy notice must indicate the proper person to whom payment is to be made, and if in this case some one other than Messrs. Lumley & Co. had been named in the notice it would have been bad. It makes no difference whether there might have been a counterclaim or set-off.

In re Binstead (3) and *Ex parte Muirhead* (4) are distinguishable. The decisions there turned on the meaning of the words "final judgment." Here the words are "final order."

LORD HANWORTH M.R. This is an appeal from a receiving order made on February 20 of this year. It appears that on April 30, 1928, a decree nisi was obtained by a husband on the ground that the debtor here had committed adultery with his wife. On July 11, 1928, an order was made by the President of the Divorce Division for the payment by the debtor of the petitioner's costs of the divorce proceedings. The order was in this form: "I order that" (the debtor) "the co-respondent do within seven days from the service of this order pay into Court the sum of 67*l.* 1*s.* 9*d.* being the amount of the petitioner's costs, as taxed and certified by one of the registrars of this Division." The order was made in that form because at that time the ultimate fate of the petition was undecided. The decree nisi might not be made

(1) (1877) 37 L. T. 38.
(2) [1912] 3 K. B. 242, 245.
(3) [1893] 1 Q. B. 199.
(4) 2 Ch. D. 22.

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absolute, and the right of the petitioner to receive the costs might never be brought to fruition. The money had therefore to be paid into Court. On October 24 a further order was made by the President in these terms: "Upon hearing the solicitors for the petitioner I do order that the order herein dated the 11th day of July 1928 be varied and that (the debtor) the co-respondent do within seven days from the service of this order pay to Messrs. H. L. Lumley & Co. of 35 Piccadilly W. 1, the solicitors of the petitioner, the sum of 67*l.* 1*s.* 9*d.* being the amount of the petitioner's taxed costs as taxed and certified by one of the registrars of this Division, the said solicitors undertaking to lodge in Court any sums recovered under this order." That variation does not add any finality to the order of July 11, for it still provides that money paid under the order shall find its way into Court. The Court relies on the undertaking of the solicitors, its officers, that they will lodge in Court any sum received by them.

On November 5, 1928, the decree nisi was made absolute. The marriage tie was then broken, the rights of the parties were finally determined, and the debtor, the co-respondent, became definitely liable to pay the 67*l.* 1*s.* 9*d.* What was that sum? It was a sum which the debtor had to pay to the petitioner as an indemnity for the costs incurred by the petitioner in the divorce proceedings.

The origin of the right to recover costs is clearly shown in *Gundry* v. *Sainsbury* (1), where it is said that costs are paid by way of indemnity to the successful litigant for the outlay he has had to make in the proceedings. In other words, the costs are paid to reimburse him for what he has paid or will have to pay. The petitioner was dominus litis in the proceedings; and if he had to pay no costs by agreement with the solicitor acting for him, that solicitor could not recover the costs himself from the debtor.

The debtor did not make the payment directed by the order of October 24, and on January 2, 1929, a bankruptcy notice was issued at the instance of Messrs. Lumley & Co.

(1) [1910] 1 K. B. 645.

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requiring payment to them by the debtor of the sum of 67*l.* 1*s.* 9*d.* The debtor did not comply with that notice, and a bankruptcy petition was presented on January 22 by Messrs. Lumley & Co. On that petition a receiving order was made, and from that order this appeal is brought.

Two points are taken in support of the appeal. First, it is said that the order of October 24 was not a "final" order justifying the issue of a bankruptcy notice, and, secondly, that these solicitors are not parties to the suit, and are not the persons who have obtained or who will obtain the final order against the debtor. It appears to me that the appeal must succeed.

Under s. 1, sub-s. 1, of the Bankruptcy Act, 1914, it is provided that a debtor commits an act of bankruptcy (*g*) if a creditor has obtained "a final judgment or final order" against him, and has served a bankruptcy notice upon him, and the notice has not been complied with within seven days; and there is this proviso to that paragraph: "For the purposes of this paragraph and of section 2 of this Act, any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order."

It is well known that that sub-section is wider in its terms than the corresponding section in previous Bankruptcy Acts. It now includes the words "final order" as well as the words "final judgment." Due significance must be attached to the word "final", because, as was pointed out by Lord Esher M.R. in *In re Binstead* (1), having regard to the importance of bankruptcy proceedings, it was right that the Court should give to the words "final judgment" their strict and proper meaning. Although, therefore, the present section includes the words "final order" we start with this, that a due importance is to be given to the word "final."

Now looking at the order of October 24, which is the basis of the bankruptcy notice, can it be said that it is a "final order" within the meaning of the section? It directs

(1) [1893] 1 Q. B. 199, 203.

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payment to the solicitors of a certain sum on their undertaking to lodge it in Court. Why was it to be paid into Court? In order that it may be the subject of a further and future order. Mr. Tindale Davis pointed out the manner in which the sum could be paid out and handed us the form of an order for payment out, from which it appears that the order is one which must be made by the registrar. It is clear, therefore, that further proceedings will be necessary to get the money out of Court, and I think it is also clear that the order of October 24, in its own terms, did not finally determine the right of the petitioner, or any one else, in respect of the sum to be paid. In my opinion, therefore, the order is not a "final order."

Several cases were cited, but I do not think it is necessary to go through them in order to come to a decision on this point.

With regard to the second point raised, that the petitioning creditors are not "creditors" within s. 4 of the Act, it is not perhaps material to our decision to consider it very fully, but I think it is also a good point. The principle raised seems to me to have been the basis of the judgment of Phillimore J. in *Ex parte Jones* (1), where he pointed out that the right party had not been put forward as principal to initiate proceedings against the debtor. Also, in *Ex parte Muirhead* (2) I think that in the judgment of Cockburn L.C.J. there is the same intention to indicate that the person at whose suit proceedings are taken must be the principal, the person in whose interest those proceedings are necessary. In my opinion the petitioning husband in this case was the person who was really the principal, for whose indemnity legal proceedings were necessary. The solicitors were merely acting as a necessary part of the machinery, under which the sum enured for the benefit of the petitioner; but they were not the principals as against the debtor.

I only wish to add that in *Ex parte Arkell* (3), although the case may not altogether be an authority for the point

(1) [1913] W. N. 263. (2) 2 Ch. D. 22, 25.
(3) 61 L. T. 90.

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on which it was cited, it was decided that a bankruptcy notice ought not to be founded on an order which directed payment to a person not the principal and perhaps not even known to the debtor.

I prefer, however, to base my judgment on the first ground—that the order was not a final order, and, therefore, that the bankruptcy notice based on it was ill-founded.

The appeal will be allowed and the receiving order discharged.

LAWRENCE L.J. I agree. In order to constitute a valid bankruptcy notice under s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, it must be grounded on a final judgment or on a final order. The order of October 24 is neither a final judgment nor a final order. By it the debtor was ordered to pay a certain sum representing the petitioner's costs of the divorce proceedings to the petitioner's solicitors on their express undertaking to lodge the sum when received by them in Court. The order was made in that form because at that time it was not known whether the petitioner would ultimately become entitled to these costs. It might turn out that any moneys paid by the debtor under the order would ultimately have to be returned to him. The order did not purport finally to determine the rights of the parties to the sum mentioned in it, and was in substance and in form a purely interlocutory order.

It was contended before us on behalf of the petitioning creditors, however, that after the decree nisi had been made absolute the title of the solicitors to the costs became indefeasible and that thereupon the order ought to be treated as a final order. In my opinion this contention is fallacious. It is true that if the order had been complied with the solicitors would after decree absolute probably have had no difficulty in obtaining an order for payment out to them of the amount paid into Court, and that in the present circumstances they would probably have no difficulty in obtaining a final order for payment of the costs either to the petitioner or to themselves instead of into Court. But that fact does not,

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in my opinion, operate to convert the order of October 24, from an interlocutory order into a final order.

I agree, therefore, that the receiving order ought to be discharged and the bankruptcy petition dismissed.

SANKEY L.J. I agree, and I prefer to rest my judgment on the ground that the order of October 24 was not a final order. It was an interlocutory order, a step in proceedings; it was a necessary step, but not a final step.

The order here is different from that made in *Ex parte Arkell* (1) in that it contains the concluding words: "the said solicitors undertaking to lodge in Court any sums recovered under this order," which did not appear in *Ex parte Arkell.* (1) I therefore rest my judgment on the particular words in this particular order which, in my view, prevent it from being final.

Appeal allowed.

Solicitors for appellant: *Kenneth Brown, Baker, Baker.*

Solicitors for respondents: *H. L. Lumley & Co.*

(1) 61 L. T. 90.

W. I. C.

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[1927. A. 2139.]

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Feb. 22, 26.

Settled Land—Perpetual Annuity charged on Land a "benefit" for Person receiving—Land "Settled Land" by reason of Charge—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (*v.*)—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 1, *Sch. I., Part II. para.* 4.

A perpetual annuity, created voluntarily, is a payment of a periodical sum for the "benefit" of the person receiving it within the meaning of s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925. Therefore land subject to such a charge became, on January 1, 1926, settled land.

ORIGINATING SUMMONS.

By his will, dated May 16, 1806, Thomas Carter gave all the residue and remainder of his real and personal estate (including property in Bermondsey) to certain trustees, their survivors, their heirs, executors, administrators and assigns upon trust, in the first place out of the rents, issues and profits of his freehold hereditaments and of his leasehold messuages, to pay and discharge five annuities. These annuities were given clear of all deductions to five of the testator's granddaughters and their husbands during their joint lives, and to the survivor of them for his or her life, and to the heirs and assigns of such survivor for ever. Clauson J. held that these annuities were perpetual annuities. By his will, dated February 16, 1835, William Carter also charged the property with certain annuities.

By her will, dated January 17, 1885, the testatrix, who had become entitled to the land in question under the wills of Thomas Carter and William Carter, subject to the annuities mentioned above, devised the estate to the use of Sir W. C. R. Austen during his life with remainder to his sons successively in tail male and in tail, with remainder to the use of A. E. R. Austen during his life with remainder to his sons successively in tail male and in tail, with remainder to F. E. Roberts for life with remainder to his sons successively in tail male and in tail, with remainder to her own right heirs,

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and she devised certain of the freehold estates in Bermondsey to trustees in fee simple upon trust out of the rents and profits thereof in the first place to pay and discharge the annuities and rentcharges charged upon the estates under the wills of T. Carter and W. Carter, and in the next place to pay four annuities bequeathed by her will, and the testatrix directed that her trustees should so long as the four annuities should be payable accumulate all the unapplied part of the rents and profits by way of compound interest for the purpose of forming a fund for the purchase of such of the annuities and rentcharges as were then charged on the estates, and the trustees were empowered out of the fund to purchase all or any of such annuities or rentcharges, and it was thereby declared that after the cesser of the four annuities the trustees might either apply the whole or any part of the fund and the accumulations and income thereof in the repairing and improvement of the estates, or should invest the same in the purchase of freehold estates, as therein directed.

The testatrix died on June 18, 1885, without having revoked or altered her will. Sir W. C. R. Austen died on November 22, 1902, without ever having had any issue. F. E. Roberts died on June 16, 1916, without ever having had any issue.

By an order made by Younger J. on May 10, 1917, the defendant Lucy Ann Margetts was appointed to represent the heir at law of the testatrix, and it was declared that the trusts for the accumulation of the surplus rents ceased on June 18, 1906, and that such surplus rents since that date and which might thereafter arise during the life of A. E. R. Austen, the surviving annuitant, belonged to the residuary devisees or their respective executors or administrators. A. E. R. Austen died on July 14, 1918, without having married. Under an order made by Sargant J. on November 1, 1921, an inquiry was directed who, upon the death of the testatrix, became beneficially entitled in remainder to the settled properties under the devise thereof by the testatrix to her own right heirs. By the Master's certificate made pursuant to that order, and dated

December 18, 1921, it was certified that the person so entitled was Bentham C. Chandler. B. C. Chandler died on November 3, 1904, having by his will appointed A. E. R. Austen his sole executor and trustee, and he devised all his real estate upon trust for sale and to divide the proceeds of sale between A. E. R. Austen and the defendant L. A. Margetts in equal shares as tenants in common. The executor appointed by A. E. R. Austen having died in his lifetime and the executrix having renounced probate, letters of administration with the will annexed were granted to the defendants Arthur W. Roberts and Elizabeth A. Roberts. In the events which had happened the residuary estate of A. E. R. Austen became divisible between the defendants A. W. Roberts, E. A. Roberts, Hugh A. Roberts and Charles Roberts. On November 23, 1923, letters of administration with the will annexed of B. C. Chandler were granted to the defendant L. A. Margetts, and on December 18, 1923, the Master certified that L. A. Margetts was entitled to the entirety of the real estate as personal representative of B. C. Chandler for the purpose of the administration of his estate, and, subject to the administration of his estate, the defendants A. W. Roberts and E. A. Roberts were entitled to the entirety of the real estate as personal representatives of A. E. R. Austen upon trust for sale, and that the persons entitled to the net proceeds of sale being as to one equal moiety the defendant L. A. Margetts in her own right, and as to the other moiety the defendants A. W. Roberts and E. A. Roberts, as personal representatives of A. E. R. Austen. All the annuities and charges arising under the will of the testatrix ceased in 1928.

This summons was taken out by the present trustees of the will of the testatrix, and it asked whether the property was now vested: (*a*) in the plaintiffs under or by virtue of the trusts of the will; and/or upon the statutory trusts under para. 1 (4.) of Part IV. of Sch. I. to the Law of Property Act, 1925; or (*b*) was vested in the Public Trustee under the same sub-paragraph; or (*c*) in the defendants A. W. Roberts and E. A. Roberts as personal representatives

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of A. E. R. Austen; or (*d*) in some other and what person or persons.

C. A. Bennett K.C. and *J. M. Paterson* for the plaintiffs. On January 1, 1926, the land was settled land by reason of a charge that was then still subsisting under the will of the testatrix: see s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925. There was then no tenant for life, and the land therefore vested in the statutory owners (see Sch. I., Part II., para. 6 (*c*), of the Settled Land Act, 1925), who were the present plaintiffs. When the last annuity under the will of the testatrix ceased, the land ceased to be settled land. It is suggested, however, that by reason of the perpetual rentcharges under the wills of the Carters, there is a compound settlement composed of those two wills, and the will of the testatrix: s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925, and *In re Bird.* (1)

Spens K.C. and *H. S. G. Buckmaster* for Charles Roberts. There is a compound settlement, and the proper persons to administer the estate are the plaintiffs. On January 1, 1926, there was a rentcharge subsisting under the will of the testatrix, and the land was settled land: s. 3 (*a*) of the Settled Land Act, 1925; *In re Draycott Settled Estate.* (2) The Carter annuities are charged on the Bermondsey property under the will of the testatrix, and her right heirs cannot compel the plaintiffs to convey the property to them while those annuities are subsisting. This case is different to *In re Braby and Newman's Contracts* (3), where the rentchargee was a corporation. In *In re Ogle's Settled Estates* (4) Romer J. took the view that the Court has to take notice of the state of affairs existing on January 1, 1926; here there was a compound settlement consisting of the Carter wills and the will of the testatrix. Sect. 1 of the Law of Property (Amendment) Act, 1926, restores the power of the tenant for life to sell, subject to encumbrances.

G. D. Johnston for L. A. Margetts. This is a compound settlement by virtue of s. 1, sub-s. 1 (v.), of the Settled Land

(1) [1927] 1 Ch. 210.
(2) [1928] Ch. 371.
(3) (1926) Not reported: see Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., vol. ii., p. 31.
(4) [1927] 1 Ch. 229.

Act, 1925, and under it a perpetual rentcharge may be overreached. Under s. 1, sub-s. 1 (*b*), of the Law of Property Act, 1925, the only rentcharges which can exist at law are either perpetual or for a term of years absolute. By Sch. I., Part II., para. 4, of the Law of Property Act, 1925, a rentcharge capable of existing as a legal charge is converted into it, but proviso (*a*) shows that the draftsman contemplated some such legal charges being overreached by virtue of a settlement, and excepts them from becoming legal charges. Sect. 191 of the Law of Property Act, 1925, which deals with redemption, does not seem to apply to this particular kind of rentcharge: see Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., vol. i., p. 450 note. In *In re King's Theatre, Sunderland* (1), the rentcharge appears to have been created for value.

[He also referred to s. 72 of the Settled Land Act, 1925.]

Swords for A. W. Roberts and E. A. Roberts. A perpetual annuity is not a "rentcharge for the life of any person, or any less period," or a "periodical sum for the portions, advancement, maintenance, or otherwise for the benefit of any persons," and therefore it does not come within s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925. Consequently land charged with a perpetual rentcharge is not therefore the subject of a settlement. Under the old law the existence of rentcharges would not have constituted a settlement. It cannot be said that a perpetual annuity is created for the "benefit" of the person who receives it. The words "for the life of any person, or any less period," show that the charge is limited to the life, or any less period, of a particular person. There ought to be an order that my clients, the trustees of the will of the right heir at law of the testatrix, have the power of appointing new trustees. They have the power of sale.

CLAUSON J. Immediately before the coming into force on January 1, 1926, of the Law of Property Act, 1925, and the Settled Land Act, 1925, the position was this: the

(1) [1929] W. N. 40; since reported [1929] 1 Ch. 483.

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perpetual annuities were still in existence; subject to those perpetual annuities, the land in question had become charged with certain life annuities, one of which was at the moment still subsisting under the will of Mrs. Austen; and subject to that remaining life annuity the land belonged to various people, and I need not concern myself with the question who they were.

If that had been all, it is clear that on December 31, 1925, before the Acts came into force, it would not be possible to say that the will of Thomas Carter settled or was an item in a compound settlement of the lands in question. So far as Thomas Carter's will was concerned, there was in existence a charge upon the lands, but subject to that charge the land belonged to persons who claimed title under persons who took absolute interests under Thomas Carter's will. So far as Thomas Carter's will was concerned no settlement was subsisting.

There was, however, one rather startling change effected in the law by the Settled Land Act, 1925. It was provided that land in certain circumstances, became, as from the moment of the coming into force of the Act, settled land by reason only of the existence of a charge upon the land. That, no doubt, was done in order to carry further in the new legislation the intention of the old Settled Land Act legislation which, as was stated by Halsbury L.C. in the House of Lords in *Lord Henry Bruce* v. *Marquess of Ailesbury*(1), was to render land a marketable article. This change was effected in this way. Under the Settled Land Act it was provided by s. 1, sub-s. 1, as follows: "Any . . . . will . . . . whether made . . . . before or after . . . . the commencement of this Act, under or by virtue of which . . . . any land, after the commencement of this Act, stands for the time being . . . . (v.) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions,

(1) [1892] A. C. 356, 361.

advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same; creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires."

A charge that will make the land which it covers settled land must, first of all, be a charge which comes into being voluntarily or in consideration of marriage, or by way of family arrangement. Now, the perpetual annuities charged on the land by Thomas Carter's will unquestionably came into being voluntarily, and so far the section is satisfied.

But the section runs: ". . . . with the payment of any rentcharge for the life of any person, or any less period. . . . ." The rentcharges in question were perpetual rentcharges, and, accordingly, were not for the life of a person or any less period. The section, however, also says: "or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same." The problem is whether it can truly be said that the perpetual annuities created by Thomas Carter's will were annual or periodical sums for the benefit of any person. They were not portions, of course; they were not sums payable for advancement or maintenance. But the section includes the words "or otherwise for the benefit of any persons." Now, unaided by any authority, and on the mere construction of this section, I should feel the greatest difficulty in limiting in any way the width of the very wide term "benefit"; and, accordingly, on the construction of the section alone I am of opinion it is true to say of the land on which these rentcharges were charged, that it was charged voluntarily with the payment of periodical sums for the benefit of certain persons, and, accordingly, that the will which effected that was a settlement, and the land was, for the purposes of the Act, settled land. I have already, in *In re Bird* (1), had to consider the word "benefit" in this section, and there I felt bound to construe the word in an unrestricted sense.

(1) [1927] 1 Ch. 210.

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But I ought not to stop there, because I must deal with a certain number of points which have been made on the construction of the Act. Some of those points are in favour of the construction which I have placed upon this section. When one turns to s. 1 of the Law of Property Act, 1925, one finds that a rentcharge in possession which issues out of or is charged on land, and is perpetual, is one of those things which is still, notwithstanding the new Law of Property Act, capable of subsisting or being conveyed or created at law. That comes to this, that a rentcharge which was a legal rentcharge before the Act may be and will continue to be a legal rentcharge after the Act. I ought to mention that the rentcharges with which I am dealing here are not legal rentcharges, and, of course, that provision has no direct application to this particular case.

But turning now to the transitional provisions which are contained in Part II., para. 4, of Sch. I. to the same Act, I find this: "Any person who, immediately after the commencement of this Act, is entitled to an equitable interest capable of subsisting as a legal estate which has priority over any legal estate in the same land, shall be deemed to be entitled for the foregoing purposes to require a legal estate to be vested in him for an interest of a like nature not exceeding in extent or duration the equitable interest: Provided that this paragraph shall not—(*a*) apply where the equitable interest is capable of being overreached by virtue of a subsisting trust for sale or a settlement." That indicates that the holder of an equitable rentcharge will be prima facie entitled to have a legal rentcharge vested in him; but he is not to be entitled to that if his equitable rentcharge is capable of being overreached by virtue of a settlement. That, at least, indicates that the Legislature quite contemplated that a perpetual rentcharge, which is the type of rentcharge that now may still subsist as a legal rentcharge, might well be overreached by a settlement. I myself do not at the moment see how a settlement within the meaning of the Settled Land Act could so operate as to enable a perpetual rentcharge to be overreached by virtue of powers, statutory or otherwise

subsisting by virtue of that settlement unless it is to be by virtue of s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925. I do not see how that could have effect, unless the true construction of that sub-section is as I have stated it to be. That is some indication that the construction which I have put upon cl. (v.) is not incorrect.

There is, I agree, one difficulty in the way of my construction, and that is this, that it is odd that the draftsman of cl. (v.) has been careful to limit rentcharges which operate so as to leave the land settled land to rentcharges for the life of a person or any less period. One would have expected that those words would be omitted, since they contain a smaller class of things than the class of things which on my construction of the section is indicated by the words "periodical sum for the benefit of a person," and that undoubtedly is a difficulty. But it seems to me to be a difficulty which is outweighed by the difficulty, in the way of the alternative view, occasioned by the existence of the provisions among the transitional provisions in Part II. of Sch. I. of the Law of Property Act, 1925, which contemplate the possible overreaching of a perpetual rentcharge.

It was suggested that a different view of the construction of cl. (v.) must have been held by Tomlin J. when he made an order of June 17, 1926, in a case of *In re Braby and Newman's Contracts.* (1) It has been suggested that a charge within this clause does not include a legal charge, such as a perpetual rentcharge, created voluntarily for an ecclesiastical or charitable purpose, and that *In re Braby* (1) is an authority for that proposition. If *In re Braby* (1) is an authority for that proposition, I should feel great difficulty in putting upon the clause in question the construction I have put upon it, for I cannot see why there should be any distinction between a legal charge and an equitable charge for the purpose in hand. I have, however, been furnished with the order made by Tomlin J. in *In re Braby* (1) and with the evidence on which it was founded; I have also had the advantage

(1) Not reported: see Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., vol. ii., pp. 31, 544.

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of a statement made to me as amicus curiae by Mr. Riviere, who was in the case, which has assisted me in understanding what there occurred. That case was this : the vendor owned some land which was subject to an ancient rentcharge payable annually to an ecclesiastical corporation sole. The point taken by the purchaser, on a vendor and purchaser summons, was that this was a rentcharge voluntarily created and that the effect of its existence was—and here the purchaser placed upon cl. (v.) the construction which I am placing upon it now—to make the land settled land, settled by the document, whatever it was, which had originally created the rentcharge. The purchaser accordingly took the point that as the land was, in his view of the construction of this section, land subject to a settlement, it was impossible for the owner of the land to convey it subject to the rentcharge. Tomlin J. held this contention to be wrong, and decided against the purchaser. As the law stood until June 16, 1926—the day before this judgment of Tomlin J.—there was considerable ground for the view that if the land was subject to a settlement by reason of the existence of a charge upon it, it was not possible even for an owner in fee to convey the land subject to the charge. Whether that difficulty did or did not exist up to June 16, 1926, there does not seem to be any doubt that the difficulty disappeared upon the passing on June 16, 1926, of s. 1 of the Law of Property (Amendment) Act, 1926, which in effect provides that in such a case as Tomlin J. had before him, where the settlement arose or was suggested to arise merely from the existence of a charge upon the land, the owner of the land may convey subject to the charge notwithstanding that the land can be treated as settled land. It was not made clear to me whether the attention of Tomlin J. was or was not drawn to the Act passed on the previous day which made it impossible for him to decide otherwise than against the purchaser. However, I gather that Tomlin J. was not satisfied that this ancient rentcharge, about the creation of which nothing was known (and, of course, nothing was known of the document, if any, creating it), came within the provisions of s. 1, sub-s. 1 (v.),

of the Settled Land Act, which requires that a charge which is to operate to make land settled land is to be charged either voluntarily or in consideration of marriage, or by way of family arrangement. Whether the decision turned on the Amendment Act or on the fact that the charge was not shown to have been created voluntarily, it is in no way inconsistent with the view of the construction of the word " benefit " which I have adopted.

I therefore hold that by reason of certain documents, subsequent in date to Thomas Carter's will, there is a compound settlement composed of that and the subsequent documents, and I shall make an order appointing the plaintiffs trustees for the purposes of the Settled Land Act of the compound settlement.

Solicitors : *Collins & Collins ; Margetts, Jenkins & Hornby ; Johnson, Weatherall, Sturt & Hardy ; Andrew, Wood, Purves & Sutton.*

P J. B.

CLAUSON J.

1929

March 22.

In re HOUSE.

WESTMINSTER BANK *v.* EVERETT.

[1929. H. 470.]

Law of Property—Land held in Undivided Shares—Death of Testator after 1925*—Devise of Land to Trustees to Divide Income amongst a Class during Period—Trust of Land at End of Period for different Class—Devise of Land to Persons in Undivided Shares—Devise to Trustees upon the Statutory Trusts—Persons for Time being Beneficially Interested in Possession in Rents of Land—Annuitants' Wishes to be Given Effect to by Trustees for Sale—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 34 *sub-s.* 3; *s.* 26, *sub-s.* 3.

The trustees of a will, which came into operation after the commencement of the Law of Property Act, 1925, were directed to stand possessed of the testators' residuary real and personal estate upon trust to pay out of the income thereof four life annuities and while any annuity remained payable to divide the surplus income amongst such of the testator's grandchildren as should be living for the period during which any annuity remained payable; and, on cesser of all the annuities to stand possessed of the residuary estate in trust for his grandchildren and the issue then living of any then dead, as tenants in common according to the stocks. By a codicil power was conferred upon the trustees after the expiration of five years from the testator's death to sell his residuary estate or any part thereof by public auction but not by private contract.

Upon a summons raising questions, whether the trustees or the persons entitled to the surplus income until cesser of the annuities were the proper persons in whom the land ought to be vested by the executor; and, if the trustees were the proper persons, whether the annuitants were persons whose wishes ought to be given effect to by the trustees for sale:—

Held, first, (*a*) that, applying the principle of *In re Flint* [1927] 1 Ch. 570; *In re Higgs' and May's Contract* [1927] 2 Ch. 249; and *In re Robins* [1928] Ch. 721, the land was held in equity in undivided shares; (*b*) that the land was devised in undivided shares within the meaning of s. 34, sub-s. 3, of Law of Property Act, 1925, with the result that it was devised to the trustees (who were trustees for the purposes of the Settled Land Act, 1925) upon the statutory trusts; and (*c*) that those trustees were the persons in whom the land ought to be vested. Secondly, that the annuitants were persons beneficially interested in possession within the meaning of s. 26, sub-s. 3, of the Law of Property Act, 1925, whose wishes should be consulted by the trustees for sale.

ADJOURNED SUMMONS.

By his will, dated December 23, 1915, the testator devised and bequeathed his real and personal estate to trustees upon

trust, subject to the payment of his debts, legacies and certain other outgoings, to pay out of the income of his residuary estate certain annuities to four named persons during their respective lives and to invest and accumulate the surplus income until his granddaughter Sylvia House should attain the age of twenty-one years or, if she should not attain that age—an event which happened—then until the date when she would have attained that age, had she lived, to the intent that such accumulated income should be added to capital and follow the destination thereof; and the testator directed his trustees from and after the expiration of such period of accumulation while any annuity should remain payable to divide the surplus income amongst such of his grandchildren as should be living for the period during which any annuity remained payable, and on cesser of all the annuities or at the date when Sylvia should attain the age of twenty-one years or if she should not attain that age then until the date when she would have attained that age, had she lived, whichever period should be more distant, stand possessed of his residuary estate with the accumulations thereof in trust for all his grandchildren living at the date of his will who should be living at the period of distribution and the issue then living of any such grandchildren dying before that period, such objects to take as tenants in common according to the stocks: and there were conferred upon the trustees, so long as his real estate, forming part of his residuary estate should remain unsold, the like powers and discretions as were conferred by the Settled Land Acts, 1882–1890, on a person having the powers of a tenant for life. By a codicil to his will, dated November 15, 1924, power was conferred upon the trustees after the expiration of five years from the testator's decease, if they should think it expedient so to do, to sell all or any part of his residuary estate by public auction but not by private contract.

The testator died on May 25, 1926, entitled to considerable freehold property and leaving nine grandchildren surviving him, all of whom attained the age of twenty-one years. Sylvia House predeceased the testator and would have

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attained the age of twenty-one years, had she lived, on March 5, 1928.

After the testator's death some of his real estate having been sold and his executor having performed his executorial duties, it became necessary to determine in whom the unsold real estate ought to be vested; and, accordingly, a summons was taken out for the determination of (amongst others) the following questions: first, whether the persons in whose favour or to whom the executor was required to assent or convey the land were (*a*) the trustees of the will for the purposes of the Settled Land Act, 1925, or, (*b*) the persons entitled to the surplus income of the residuary estate until the cesser of the annuities; secondly, if the Court should hold in favour of the trustees, whether they were empowered to sell the land, notwithstanding the restrictions on sale imposed by the codicil, and whether in pursuance of s. 26 of the Law of Property Act, 1925, they should give effect to the wishes of the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale; and, if so, whether the annuitants were such persons within the meaning of sub-s. 3 of that section.

Nicholson Combe for the plaintiffs, the executor and the trustees of the will. The persons in whom the executor must now vest the legal estate are the trustees of the will. This is a case of a devise of land, coming into operation after 1925, to two or more persons in undivided shares within the meaning of s. 34, sub-s. 3, of the Law of Property Act, 1925. The trustees of the will have under the will a future power of sale. They are, therefore, trustees of the will for the purposes of the Settled Land Act, 1925, under s. 30, sub-s. 1 (iv.), of that Act. The devise operates under s. 34, sub-s. 3, of the Law of Property Act to vest the land, subject to the executor's interest, in those trustees; and they are to hold the land on the statutory trusts, as defined by s. 35 of that Act. The words "undivided shares," as occurring in the transitional provisions in Part IV. of the First Schedule to that Act, have been construed in the three cases of

In re Flint (1); *In re Higgs' and May's Contract* (2); and *In re Robins.* (3) If the same construction be adopted in this case, then s. 34 of the Law of Property Act, 1925, must apply. The question is whether the provisions of ss. 1, 19, 20 and 36 of the Settled Land Act, 1925, prevent that construction from being applied.

By s. 1, sub-s. 1 (i.), of that Act, a will under which land, after the commencement of that Act, stands limited by way of succession (as in the present case) creates a settlement. But that is only material here for the purpose of ascertaining the status of the trustees of the will. It might be said that the grandchildren, amongst whom the surplus income is to be divided, are persons beneficially entitled to possession of settled land for their lives as joint tenants and, therefore, constitute a tenant for life for the purposes of that Act, under s. 19, sub-s. 2. Or, it might be said that the grandchildren have the powers of a tenant for life under s. 20, sub-s. 1 (viii.), as the words in s. 20 are susceptible of the plural number: see *In re Stevens and Dunsby's Contract.* (4) That might qualify the grandchildren as persons entitled to the income of land under a trust for the payment to them during their own or any other life or until cesser of their interests therein; the land not being under the will subject to an immediate binding trust for sale. But to hold that the provisions of ss. 19 and 20 of the Settled Land Act, 1925, prevent this being a case of undivided shares in land would be inconsistent with the decision in *In re Robins* (3), where the fact that s. 19 contemplated plurality of income takers was brought to the notice of the Court. As to s. 36, sub-s. 1, it is submitted that "settled land" there means land settled before January 1, 1926; and therefore that section does not affect this case.

Whatever view may be taken of the correctness of the construction adopted in *In re Robins* (3) that construction ought, it is submitted, to be applied here, as the words in s. 39 of the Law of Property Act, 1925, which introduce the

(1) [1927] 1 Ch. 570.
(2) [1927] 2 Ch. 249.
(3) [1928] Ch. 721.
(4) [1928] W. N. 187.

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transitional provisions of Part IV. of the First Schedule to that Act, are sufficiently similar to the words in s. 34 to warrant that application; and nothing in ss. 1, 19, 20 and 36 of the Settled Land Act, 1925, prevents that application.

Philip Sykes for the defendant Arthur R. Everett, a grandchild. The grandchildren are the persons entitled to have the land vested in them, as tenants for life under the Settled Land Act, 1925. They take the surplus income as joint tenants, because the survivors and survivor are to take. The cases cited are decisions on Part IV. of Sch. I. of the Law of Property Act, 1925, and cannot be taken as governing s. 34, sub-s. 3, of that Act. The words in para. 1 of Part IV. of Sch. I. of the Act of 1925, are: "Where . . . . land is held at law or in equity in undivided shares"; while in sub-s. 3 of s. 34 the words are "a devise . . . . of land to two or more persons in undivided shares." Here the devise being of land to trustees in trust to divide the income for a period among a class is not a devise of land in undivided shares. If the case does not come within that sub-section it does not come within s. 36 of the Settled Land Act, 1925, so as to set up a trust for sale quacunque via. If the land devised is land devised in undivided shares within s. 34, sub-s. 3, of the Law of Property Act, 1925, the same construction must be given to the same words in s. 36 of the Settled Land Act, 1925, with the result that a trust for sale may be imposed and the settlement may go by the board, though without prejudice, it is admitted, to the beneficial interests thereunder. This would occur where a single tenant for life assigned a portion of his income under the settlement, or, where, in the case of two joint tenants for life, there is a severance, as, e.g., by one of the joint tenants mortgaging his share or going bankrupt. By accident or by design a settlement could thus easily be interfered with. In such cases the legal estate would require to be conveyed from the tenant for life to the trustees; while, as by s. 28 of Law of Property Act, trustees for sale are given all the powers of a tenant for life, a further effect would be to shift the powers from the tenant for life to the trustees. The cases cited are distinguishable from the present on the

facts; here there is survivorship between the grandchildren, while in the cases cited the shares are kept separate.

Upon the second question, the annuitants are not persons whose wishes need be consulted by the trustees for sale: they are not persons beneficially interested in possession in the rents and profits of the land until sale within the meaning of s. 26, sub-s. 3, of the Law of Property Act. In the opinion of Russell J. in *In re Stamford and Warrington (Earl)* (1), para. 1 of Part IV. referred to a condition of affairs where two elements are present—namely, first, the absence of any antecedent freehold estate, and secondly, present immediate beneficial enjoyment by possession physical or notional. The annuitants do not fulfil the second element.

John W. F. Beaumont for an annuitant. This is a devise within the meaning of s. 34, sub-s. 3, of the Act of 1925. It is more convenient that the trustees should sell, whether the land is settled land or not. Quacunque via the trustees are the persons to sell.

CLAUSON J. The testator, being possessed of both land and personal estate, by his will devised and bequeathed them to trustees upon trust, after the payment of his debts and certain other usual outgoings, out of the income of the residuary real and personal estate to pay certain life annuities to persons whom he names, and, in the events which happened, to divide the surplus income, after providing for the payment of the annuities, amongst "such of my now living grandchildren as shall be living for the period during which any annuity remains payable as aforesaid": then on cesser of all the annuities there is a trust in favour of a somewhat large class who are to hold as tenants in common, that is to say, in undivided shares.

Now having regard to the decisions in *In re Flint* (2); *In re Higgs' and May's Contract* (3), and *In re Robins* (4), I am, I conceive, bound to hold, and I do hold, that real estate held on trust during certain lives to pay the income to certain

(1) [1927] 2 Ch. 217, 221.
(2) [1927] 1 Ch. 570.
(3) [1927] 2 Ch. 249.
(4) [1928] Ch. 721.

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persons in undivided shares is, by reason of that circumstance, held in equity in undivided shares.

In this particular case, the land being, as I have said, held in equity in undivided shares, I have to consider what the effect is of s. 34, sub-s. 3, of the Law of Property Act, 1925. The land, as I say, is held, and held under a will in equity, in undivided shares. Is not that merely another way of saying that the will operates so as to devise and bequeath the land to two or more persons in undivided shares? The answer to that question seems to me to be in the affirmative. If so, then by reason of s. 34, sub-s. 3, of the Law of Property Act, 1925, the will operates as a devise or bequest to the trustees of the will for the purposes of the Settled Land Act, 1925, upon the statutory trusts therein referred to. There is no dispute in this case as to who are the trustees of the will for the purposes of the Settled Land Act, 1925. By reason of the existence of a future power of sale in the will, those trustees are the plaintiffs. I do not understand it to be disputed that, if I am correct so far, the executor of the will ought to assent or convey the lands forming part of the residuary estate of the testator to the plaintiffs as trustees of the will for the purposes of the Settled Land Act, 1925, and I so answer the first question.

As regards the second question: in my judgment, the plaintiffs, after the land has been so vested in them, will be empowered to sell the land, notwithstanding the restrictions on sale sought to be imposed by the codicil; and, further, the annuitants, being, in my opinion, 'persons beneficially interested in possession," within the meaning of those words in s. 26, sub-s. 3, of the Law of Property Act, 1925, are, consequently, persons (amongst others) whose wishes the trustees ought to consult before a sale of the land.

Solicitors for all parties: *Geo. Tilling & Knight.*

H. C. H.

In re BARCLAY.

GARDNER *v.* BARCLAY.

STEUART *v.* BARCLAY.

[1910. B. 2377.]

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TOMLIN J.
Jan. 17, 18, 24.
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March 19, 20, 21; *April* 15.

Will—Construction—Gift at Death of Tenant for Life to "the Superior of the Jesuit Church of the Immaculate Conception . . . . to the Superior . . . . at the time of the legacy falling due"—Gift over on Failure "to any other representative Father of the Order"—Death of Tenant for Life—Superior of Order not same as at Death of Testatrix—Validity of Gift—Whether absolute or on trust—Roman Catholic Relief Act, 1829 (10 *Geo.* 4, *c.* 7), *s.* 28—*Promissory Oaths Act*, 1871 (34 *&* 35 *Vict. c.* 48), *Sch. I., Part II.—Roman Catholic Relief Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 55).

A bequest for the benefit of a Church belonging to a monastic order of the Roman Catholic Church but open to the public was not rendered invalid by the Roman Catholic Relief Act, 1829.

Liston v. *Keegan* (1882) 9 L. R. Ir. 531 disapproved.

In re Greene [1914] 1 I. R. 305 approved and followed.

A testatrix by her will dated September 7, 1903, gave the residue of all her property, after the death of G., to whom she had given a life interest, in the following terms: "To the Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, to the Superior of that Church at the moment of the legacy falling due, and failing him to any other representative Father of the Order of the Society of Jesus. . . . ."

The testatrix died in 1910, and G. died in 1928. The Superior of the Church of the Immaculate Conception, Farm Street, London, was not the same person at the death of the testatrix as at the death of G.:—

Held, by Tomlin J., that the gift was a valid gift to the Superior at the moment of G.'s death absolutely.

On appeal:—

Held, that the gift was to this Superior upon trust for the benefit of the Church at Farm Street as he might in his discretion think fit; and that this was a valid gift.

SUMMONS WITH WITNESSES.

By her will dated September 7, 1903, Jane F. P. Barclay, spinster (hereinafter called "the testatrix"), gave and bequeathed the whole of her property and money, and all her Bank of Scotland stock and shares, to Agnes Mary Gardner, spinster, for the term of her natural life; and she charged her that out of the said legacy of stocks and shares and interests she should in her (the testatrix's) name give two donations of 20*l.* and 40*l.* to two French priests respectively

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as therein mentioned free of legacy duty; and if both should be dead at the time of her decease, the said Agnes Mary Gardner was empowered to give the entire sum to the priests of the Society of Jesus as therein mentioned. And the testatrix declared that on the death of Agnes Mary Gardner, she gave and bequeathed the aforesaid property, money, stocks, shares, interests and benefits arising therefrom (save the two donations of 20*l.* and 40*l.*, "which shall be paid either by the said Agnes Mary Gardner or in the event of her death by the Society of Jesus") in the following terms: "To the Superior of the Jesuit Church of the Immaculate Conception Farm Street London to the Superior of that Church at the moment of the legacy falling due and failing him to any other representative Father of the Order of the Society of Jesus through which Society I received the Grace of the true Faith of the One Holy Catholic and Apostolic Church of Rome in which Faith I an unworthy but faithful child desire to live and die." The testatrix appointed the said Agnes Mary Gardner sole executrix of her will, and died on February 6, 1910. Probate was granted by the Principal Probate Registry on April 14, 1910.

On July 13, 1910, an originating summons [1910. B. 2377] relating to questions arising in connection with the testatrix's will, was issued by Agnes M. Gardner; to which Mary E. Barclay, spinster, a sister of the testatrix, and who claimed as the next of kin to be entitled to the personal estate of the testatrix not disposed of by the will, was defendant.

The summons was subsequently amended by adding the name of the then Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, the Reverend C. Nicholson, as a defendant.

By an order of Warrington J. dated January 14, 1911, the judge dealt with certain questions arising on the summons, but ordered that question 3 therein, which related to the validity or invalidity of the gift to the Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, should stand over, with liberty for the parties to apply on the death of Agnes M. Gardner. Agnes M. Gardner

died on April 9, 1928, having by her will dated June 6, 1924, made her sister Eugenie M. F. Gardner the only beneficiary and appointed her sole executrix thereof.

It appeared that at the date of the death of Agnes M. Gardner the Superior of the Jesuit Church at Farm Street was the Reverend Robert H. J. Steuart in place of the Reverend C. Nicholson, who had ceased to be so since 1914.

By an order dated July 16, 1928, it was ordered that the proceedings in the matter of the estate of the testatrix be carried on between the Reverend Robert H. J. Steuart as plaintiff and Eugenie M. F. Gardner, the legal personal representative of Agnes M. Gardner; the Reverend C. Nicholson and Mary E. Barclay as defendants.

The matter now came before the Court for the determination of the question relating to the gift in the testatrix's will to the Superior of the Jesuit Church, Farm Street, London.

Gover K.C. and *W. F. Swords* for the plaintiff. The plaintiff is entitled under the words in the will to the gift absolutely. This gift is to the individual who at a given moment, namely, the death of the tenant for life, occupies the position of the Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London. It is as if the individual intended was indicated by name. The gift is also unqualified in terms by any trust. But if not an absolute gift, then it can only be one in terms to a legatee by description as the holder of an office and not beneficially, and the question then arises for whom or on what trusts. The answer, it is submitted, can only be for the persons constituting the community of whom he is the Superior. The authorities show that a gift such as this is to the individual holder; the particular community is a voluntary association, and the Superior must be the representative Father indicated by the testatrix.

First, as regards the Roman Catholic Relief Act, 1829, it cannot be relied on by the next of kin, as it was repealed as to ss. 26 and 28 to 36 inclusive by the Roman Catholic Relief Act, 1926.

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[TOMLIN J. It does not seem as if the Act of 1926 was relevant.]

The gift might be held charitable, and a valid one to the Community: *Cocks* v. *Manners* (1); *In re Smith.* (2) There is no question here of perpetuity. Nor is it a gift for superstitious uses: *Bourne* v. *Keane.* (3) As to gifts to named individuals as the holders of an office, see *In re Delany* (4); and also compare *In re Garrard.* (5)

If it is good law to say that it is a gift to a person by virtue of his office at a certain date, it is an argument against it being applied beneficially. The rule must be one of construction. A gift to A. by any description is, it is submitted, prima facie a gift to that person; but the Court may declare that it is by way of trust and not beneficially. Here, it is submitted, it is a gift to the plaintiff as an individual. The only other alternative is for the Court to be asked to imply a trust; and therefore the question must arise, what trust? The answer can only be, for the persons of whom he is Superior, that is, the particular church. But here, the words in the will indicate a plain gift to an individual.

Sir T. Hughes K.C. and *F. H. L. Errington* for Mary E. Barclay, the next of kin of the testatrix. The gift cannot be intended for the plaintiff, as Superior, beneficially. The case of *Cocks* v. *Manners* (1) will not assist the plaintiff. If it is a gift to the whole Order, it is void.

[TOMLIN J. The ratio of these cases is that there is no trust, but the gifts are to individuals for what they please.]

In the case of *Thornber* v. *Wilson* (6) the gift was held void: see also *In re Delany.* (4) It is submitted that the gift was clearly one to the Order of the Society of Jesus, and that the Superior of the Farm Street Community or some other representative Father could give a discharge. If so, at the time of the death of the testatrix, the gift was illegal: see the Roman Catholic Relief Act, 1829.

(1) (1871) L. R. 12 Eq. 574, 585, 586.
(2) [1914] 1 Ch. 937.
(3) [1919] A. C. 815, 874, 916, 926.
(4) [1902] 2 Ch. 642.
(5) [1907] 1 Ch. 382.
(6) (1858) 4 Drew. 350.

[TOMLIN J. Is there any direct authority that a gift to a monastic body is void ?]

There is no English authority (see, however, the observations of Lord Buckmaster and Lord Parmoor in *Bourne* v. *Keane* (1); but there have been several in Ireland declaring gifts to be void: compare *In re Smith* (2); and see also the case of *In re Boyd.* (3)

[*R. A. Glen* for the Reverend C. Nicholson directed the attention of the Court to the fact that the Roman Catholic Relief Act, 1829, had been partly repealed by Part II. of the First Schedule to the Promissory Oaths Act, 1871.]

The repeal of a preamble makes no difference; it was not in force then. And see remarks of Lord Esher M.R. in *Powell* v. *Kempton Park Racecourse Co.* (4); and Lord Blackburn in *Overseers of West Ham* v. *Iles.* (5) The gift here is one absolutely and entirely for ever; and means one held by this Society as an endowment, and therefore creates a perpetuity and is not a charity. The gift is invalid and the next of kin are entitled. The difference between this case and *In re Smith* (2) is that in *In re Smith* (2) there was a gift to certain people residing at A., and there was no doubt who they were; but in this case the gift is to an Order. In *In re Smith* (2) it was not a gift to an Order but to . . . . the society . . . . known as the Franciscan Friars of C. in the county of S. absolutely.

[TOMLIN J. Is there any evidence on the constitution or history of the Order of Jesuits ?]

There is a work in Latin on the subject: Constitutiones Societatis Jesu, published 1827 (Avignon).

[The plaintiff was called as a witness, and gave evidence as to the constitution and objects of the Order generally. He stated that the Society was intended for missionary work and teaching. The original object was to set up a counter reformation. By means of Roman Catholic schools, the Order tried to extend their faith.]

(1) [1919] A. C. 815, 874, 875, 916.
(2) [1914] 1 Ch. 937, 939.
(3) The Times, Nov. 25, 1907, p. 5.
(4) [1897] 2 Q. B. 242, 256.
(5) (1883) L. R. 8 App. Cas. 386, 388.

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[TOMLIN J. The Act of 1829 must be considered.]

Yes; but the Act only deals with monastic orders: see *In re Boyd.* (1) It makes Jesuit establishments illegal and renders such communities unlawful if they remain in England. *Cocks* v. *Manners* (2) is very different from this case; there they could divide the fund among themselves if they chose to do so. Nor was it a monastic body. In *In re Smith* (3), one of the obligations which in the Order of Jesuits are necessary for a member had been released by the Pope—namely, the vow of poverty. As this gift is illegal in its inception, it is submitted that the next of kin are entitled.

R. A. Glen for the Reverend C. Nicholson.

C. R. D. Richmount for Miss E. M. F. Gardner, personal representative of the executrix of the testatrix.

Gover K.C. The case of *In re Boyd* (1) is relied on. Here the obvious interpretation is, it must be a gift to the individual himself: compare Joyce J.'s remarks in *In re Smith.* (4) If this gift is not to the plaintiff beneficially, it can only be one on trust for some one or the community itself, and *In re Smith* (4) would apply. There might be even a trust implied for the Order as a whole, in spite of its world-wide radius. But the real question is one of intention, and in this case the intention of the testatrix is clearly shown.

Cur. adv. vult.

Jan. 24. TOMLIN J. A testatrix, who was received into the Roman Catholic Church in 1894, died on February 6, 1910. By a holograph will, which bore date September 7, 1903, the testatrix disposed of all her property in such manner as to give, as this Court held some years ago, a life interest therein to one, Agnes Mary Gardner, charging her to pay a pecuniary legacy to each of two French priests or both legacies to the survivor if only one of the priests survived the testatrix, and in the event of the decease of both priests, Agnes Mary Gardner was empowered to give the aggregate amount of the two legacies to the priests of the Society of Jesus for the

(1) The Times, Nov. 25, 1907.
(2) L. R. 12 Eq. 574.
(3) [1914] 1 Ch. 937, 943.
(4) [1914] 1 Ch. 937, 948.

repose of the soul of the testatrix. The will then proceeded as follows: "In the event of the death of the said Agnes Mary Gardner I give and bequeath absolutely and entirely for ever my aforesaid property, money, stocks, shares, interests and benefits arising from them (saving the two donations) above mentioned which shall be paid either by the said Agnes Mary Gardner or in the event of her death by the Society of Jesus I give and bequeath all the above mentioned property, money, stocks, shares interests and benefits without any intermediary legatees whatsoever all the above legacy (saving the aforesaid donations) to the Superior of the Jesuit Church of the Immaculate Conception Farm Street London —to the Superior of that Church at the moment of the legacy falling due and failing him to any other representative Father of the Order of the Society of Jesus through which Society I received the grace of the true Faith of the One Holy Catholic and Apostolic Church of Rome in which Faith I an unworthy but faithful child desire to live and die. I appoint the said Agnes Mary Gardner my executrix."

Agnes Mary Gardner died on April 9, 1928, the two legacies having been paid long before. The question now arises as to the effect of the ultimate dispositions of the estate contained in the will.

The Roman Catholic church known as the Church of the Immaculate Conception, Farm Street, is served by a community of priests belonging to the Order of the Society of Jesus with a Superior at their head. It was at this church and by its Jesuit priests that the testatrix was received into the Roman Catholic Church, and I think it is plain from the will that she regarded that fact as constituting an important link between her and the community of Jesuit priests serving the church. The Order of the Society of Jesus was founded by Ignatius Loyola in the first half of the sixteenth century. At the present day its members number over 20,000 persons of divers nationalities in divers lands. Its members, other than novices, are bound by the three vows of poverty, chastity and obedience to the General of the Order. The members of the highest grade in the Order take a fourth vow of

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obedience to the Pope. The General of the Order has his seat at Rome, and is the absolute ruler of the Order. The present General is of Polish nationality, and I am told that no Englishman has ever been General of the Order. For the purposes of this Order, the world is divided into Provinces, ruled by Provincials. England and Scotland form one Province, and within each Province are Houses or Communities ruled by Superiors. The Farm Street Community is a House of the Province of England and Scotland, and its members, numbering about twenty persons, are bound by the three vows. The Provinces, and the Communities within the Provinces in respect of local and domestic matters, are practically autonomously ruled by their respective Provincials and Superiors, though such Provincials and Superiors are theoretically subject to the direction of their superior officers in the Order. By s. 28 of the Roman Catholic Relief Act, 1829 (1), it was enacted as follows: [His Lordship read the section.] Under the subsequent sections of the Act, it was in effect made illegal for any Jesuit or member of any of the

(1) Roman Catholic Relief Act, 1829, s. 28: "And whereas Jesuits, and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom; and it is expedient to make provision for the gradual suppression and final prohibition of the same therein; Be it therefore enacted, that every Jesuit, and every member of any other religious order, community, or society of the Church of Rome bound by monastic or religious vows, who at the time of the commencement of this Act shall be within the United Kingdom, shall within six calendar months after the commencement of this Act deliver to the clerk of the peace of the county or place where such person shall reside, or to his deputy, a notice or statement, in the form and containing the particulars required to be set forth in the Schedule to this Act annexed; which notice or statement such clerk of the peace, or his deputy, shall preserve and register amongst the records of such county or place, without any fee, and shall forthwith transmit a copy of such notice or statement to the chief secretary of the Lord Lieutenant or other chief governor or governors of Ireland, if such person shall reside in Ireland, or if in Great Britain, to one of His Majesty's principal secretaries of state; and in case any person shall offend in the premises, he shall forfeit and pay to His Majesty, for every calendar month during which he shall remain in the United Kingdom without having delivered such notice or statement as is hereinbefore required, the sum of fifty pounds."

Orders affected by this Act, not being a natural-born subject and a Jesuit or such member at the commencement of the Act, to enter the realm except under licence of the Secretary of State, limiting his stay to a period not exceeding six months, and it was also made illegal within any part of the United Kingdom to become a Jesuit or member of any such Order or to admit any person as a Jesuit or member of any such Order. The Act did not apply to communities of women. The Act was not in fact ever enforced, and was repealed by the Roman Catholic Relief Act, 1926.

The plaintiff, Father Steuart, was at the death of the tenant for life, and is, the Superior of the Farm Street House. He was not the Superior at the death of the testatrix, and there have been several intermediate holders of the office of Superior since that day. Father Steuart claims the residue as being, in the events which have happened, persona designata under the gift; and further claims that he takes the gift free from any trust, or, if there is any trust, subject only to a trust in favour of the individuals who constituted the Farm Street Community when the disposition took effect. It is contended on his behalf that such a trust, if any, is valid on the principle of the decisions in *Cocks* v. *Manners* (1) and *In re Smith.* (2)

It is, however, urged on behalf of the next of kin of the testatrix, that upon the true construction of the will, there is a gift to the Order of the Society of Jesus for the purposes of the Order, or at least to the Community for the purposes of the Community; and that the Superior of the Church of the Immaculate Conception or other representative officer of the Society of Jesus, are only named as the persons able to give a discharge for the money; and that therefore, having regard to the Act of 1829, the gift is in either view invalid; the Act of 1926 not being retrospective in its operation and therefore having no application to the case. It was indeed but faintly urged on behalf of the plaintiff that any help could be derived from the Act of 1926, and I am satisfied that the Act of 1829 governs the case, if on

(1) L. R. 12 Eq. 574. (2) [1914] 1 Ch. 937.

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construction there is room for its application. Assuming that there is a gift to the Order of the Society of Jesus, the principle of *Cocks* v. *Manners* (1) could not in my judgment be reasonably applied, the Order being a great world-wide international organization with a membership of over 20,000 persons. If this principle is not applicable, I am of opinion that, having regard to Warrington J.'s decision in *In re Boyd* (2), and the observations of Lord Parmoor and Lord Buckmaster in *Bourne* v. *Keane* (3), a Court of first instance could not hold a gift to the Order to be good. What then is the effect of the gift? The only express gift in terms is to the Superior of the Church at the moment of this legacy falling due, or failing him to any other representative Father of the Order of the Society of Jesus.

In my opinion the gift to a person described as the Superior does not per se make him a trustee, even though he may not be personally known to the testatrix, nor do I think he can be fixed with a trust, because by vow or otherwise, he is under some obligation of conscience carrying no legal sanction to deal with what he receives in a particular way. Apart from these considerations, there is nothing else in the language of the disposition upon which to found any implication of a trust, unless ground for it is afforded by the reference to the payment of the legacies to the Society of Jesus; and by the phrase, "any other representative Father of the Order of the Society of Jesus."

In my judgment it is not for a Court of construction to be over subtle in attaching meanings to doubtful dispositions. The only safe rule is to adhere as closely as may be to the natural meaning of the words. Nor is it, I think, legitimate, in the absence of express words of trust, to imply a trust unless the trust arises by necessary implication from the language used. In my opinion in this case there is no such necessary implication. I have little doubt that the testatrix hoped to benefit the Farm Street Community, and that the phrase "representative Father" means the Jesuit Father

(1) L. R. 12 Eq. 574.
(2) Times Newspaper, Nov. 25, 1907.
(3) [1919] A. C. 815, 874, 875, 916.

who, in the absence of a Superior, should be representative of the Church of the Immaculate Conception. I am sure she did not intend the money to fall to the General of the Order at Rome, or to the Order at large; and that the Society of Jesus for her, meant the Community in Farm Street; and that this direction for the Society to pay the legacy, means that the Community should pay it; and is inserted by way of caution, having regard to the vows which in conscience bind the individual members. I prefer to read, and I think I ought to read, the gift as literally as I can. Father Steuart answers to the description of the Superior at the moment of the legacy falling due, and there is an express gift to him. If any trust is to be implied it cannot, I think, be wider than a trust for the members of the Community at Farm Street at the moment of the legacy falling due; and such a trust would, in my opinion, be good on the principle of *Cocks* v. *Manners*. (1) I prefer, however, to hold, and do hold, that upon the true construction of this will, and in the events which have happened, the gift is an absolute one to Father Steuart, and I shall declare accordingly.

A. R. T.

C. A.

The defendant Mary E. Barclay, one of the next of kin, appealed. The appeal was heard on March 19, 20, 21.

Sir Thomas Hughes K.C. and *F. H. L. Errington* for the appellant. On the true construction of the will the gift in question is in effect to the Society of Jesus and is invalid under the Roman Catholic Relief Act, 1829. The gift failing a Superior "to any other representative Father of the Order of the Society of Jesus," makes it clear by implication that the donee—whether the Superior or another representative Father—takes in a representative capacity as representing the Order of the Society of Jesus. The motive of the gift is indicated by the words "through which Society I received the grace of the true faith." Further a gift to a person described by his office is a gift to him as an official and not for his own benefit: *Thornber* v. *Wilson* (2); *In re Delany*. (3)

(1) L. R. 12 Eq. 574. (2) (1855) 3 Dr. 245; (1858) 4 Dr. 350.
(3) [1902] 2 Ch. 642

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[RUSSELL L.J. May not "representative Father" mean representative of the Community or Church at Farm Street ?]

The obvious construction is representative of the Order. Grammatically "representative" must refer to the Order. The words "representative Father" must mean any Father who is representative of the Order for the purpose of giving a good receipt either by reason of his position or of a special appointment by the General of the Order. This construction receives support from the fact that earlier in the will the donations of 20*l.* and 40*l.* are made payable by the Society, if the tenant for life has not paid them in her lifetime.

[RUSSELL L.J. If the gift were to the Superior for the benefit of the Church, would that be valid ?]

It is submitted not. But that is not the true construction ; it is inconsistent with the language of the will. It is a gift for the benefit of the Order, and as such it is invalid by reason of the Roman Catholic Relief Act, 1829, ss. 28 to 36. These sections made it illegal for any member of a monastic order of the Church of Rome to remain in this country without licence and for any new member to come into the country and for any one in this country to be admitted as a new member. The preamble in s. 28 states the object in these words : "it is expedient to make provision for the gradual suppression and final prohibition" of religious orders of the Church of Rome in the United Kingdom. The result is that a gift for the benefit of such an Order is invalid, as was recognized by the Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97), s. 15, which is a legislative interpretation of the Act in terms prohibiting bequests to any religious order of the Church of Rome in Ireland or the members thereof. Further the Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134), s. 6, recognizes the Act of 1829, and in terms provides that nothing in the Act of 1860 was to repeal the provisions of the Act of 1829 "respecting the suppression or prohibition of the religious orders and societies of the Church of Rome bound by monastic or religious vows." The Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), repealed the Act of 1829, but with exceptions that

included ss. 28 to 36. It was only by the Roman Catholic Relief Act, 1926 (16 & 17 Geo. 5, c. 55), that these sections were repealed, but that Act does not apply to the present case, as the testatrix died in 1910.

The effect of the Roman Catholic Relief Act, 1829, has been considered in a number of Irish cases and held to render gift to monastic orders of the Roman Catholic Church invalid: see *Cussen* v. *Hynes* (1), where a legacy to the Superior of a Franciscan Convent for educating a priest of that Community was held to be void. *Cocks* v. *Manners* (2) has no application here. In *In re Smith* (3) Joyce J. went too far in construing a gift to the Institution known as the Franciscan Friars as an absolute immediate gift to the individual Friars, and held it to be valid notwithstanding the Act of 1829. It does not accord with the Irish cases; and though he purported to follow *Cocks* v. *Manners* (2), he went beyond it, for in *Cocks* v. *Manners* (2) the Court dealt with a question of perpetuities and was not concerned with the Act of 1829. That Act was discussed in *Bourne* v. *Keane* (4), and it was not suggested that it did not render gifts to monastic orders invalid. If there was any doubt as to this, it is disposed of, as already pointed out, by the Charitable Donations and Bequests (Ireland) Act, 1844. The Court will construe an earlier by reference to a later Act: *Miller* v. *Salomons* (5); *Battersby* v. *Kirk.* (6)

Sir Gerald Hurst K.C. and *W. F. Swords* for the Superior. The gift is to a persona designata. The description of a man by reference to his office in a bequest is not enough to impose a trust upon him. There must be something in the will containing the gift to show an intention to create a trust. This is the explanation of *Thornber* v. *Wilson* (7) and *In re Delany* (8): see also Coke upon Littleton 42 (*b*). Here there is a clear and unambiguous gift to the Superior in existence at the death of the tenant for life as a persona

(1) [1906] 1 I. R. 539.
(2) L. R. 12 Eq. 574, 585, 586.
(3) [1914] 1 Ch. 937.
(4) [1919] A. C. 815.
(5) (1852) 7 Ex. 475; (1853) 8 Ex. 778, 786.
(6) (1836) 2 Bing. N. C. 584, 609.
(7) 3 Dr. 245; 4 Dr. 350.
(8) [1902] 2 Ch. 642.

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designata. As such it ought not to be modified by reference to the gift over which never took effect.

Assuming however that the gift was to the Superior as a trustee, there are three alternative trusts: (1.) a trust for the Church of the Immaculate Conception; (2.) a trust for the Community at Farm Street; and (3.) a trust for the benefit of the Order of the Society of Jesus. In any case the gift would, it is submitted, be valid, but on the true construction the gift was for the benefit of the Church. The Church being open to use by the public such a gift is valid. The contrary view was taken in some of the Irish cases doubted in *In re Smith* (1), and they have now been treated as incorrect by O'Connor M.R. in *In re Greene.* (2) It is said that this construction of the gift is made impossible by the gift over "to any other representative Father of the Order." But the word "representative" taken in its context means representative of the Church at Farm Street. The Superior was not a person appointed to represent the whole Order.

But if the gift be construed as a gift upon trust for the Community at Farm Street, that also is valid, for it operates as a gift to the individual members at the time when the gift took effect: *In re Smith* (1); and see *Bourne* v. *Keane.* (3)

Even if the gift be construed as creating a trust in favour of the whole Society of Jesus, it is still valid. There is nothing in the Act of 1829 to render such a gift void. The Act contemplates the gradual suppression of monastic orders, but it does nothing to make them outlaw or disqualify them from holding property. There is nothing except the policy of the Act to suggest that a gift to such a body would be invalid, and this is not enough. Penal statutes must be construed strictly, and not by reference to any preamble indicating a policy: *Attorney-General* v. *Sillem.* (4) Nor ought resort be had to the Charitable Donations and Bequests (Ireland) Act, 1844, in construing the 1829 Act: see *In re Greene.* (2) In any case it is submitted that the Roman

(1) [1914] 1 Ch. 937.
(2) [1914] 1 I. R. 305, 313.
(3) [1919] A. C. 815, 874, 916.
(4) (1863) 2 H. & C. 431.

Catholic Relief Act, 1926, applies here. Although the testatrix died before that Act came into force, the tenant for life did not.

[RUSSELL L.J. If the bequest was invalid at the death of the testatrix, the title of the next of kin accrued then.]

C. R. D. Richmount for the testatrix's executrix by representation.

Sir Thomas Hughes K.C. replied.

April 15. LORD HANWORTH M.R. The question to be determined in this appeal is whether a bequest under the will of Miss Jane Frances Penelope Barclay is good and valid. Tomlin J. held that it is, and the next of kin appeal.

The testatrix was admitted a member of the Roman Catholic Church in 1894, at the Church of the Immaculate Conception, Farm Street, Mayfair. After that date she lived a good deal abroad in France, and she made her will on September 7, 1903, and died on February 6, 1910.

By the terms of her will she gave a life interest in her estate to Agnes Mary Gardner. This was decided to be the effect of the terms of her will by an order made by Warrington J. on January 14, 1911.

Agnes Mary Gardner died on April 9, 1928, and the question now arises whether the gift over of the residuary estate upon the death of Miss Gardner is effective, or whether there is an intestacy under the will in respect of it. The relevant portion of the will is as follows: [His Lordship read the terms of the bequest as set out at p. 174, ante].

It may be significant to bear in mind that the will gave the two legacies referred to in this passage to two Reverend Fathers, which were paid at or near the time of the death of the testatrix; but in respect of which the will provided that in the event of the decease of the two legatees before the testatrix, then Miss Gardner, was empowered to give the entire sum of the two legacies "to the priests of the Society of Jesus for the repose of my soul."

It is argued for the next of kin that upon the true construction of the above words there is a gift to the Order of

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the Society of Jesus for the purpose of the Order, or at least to the Community of Jesuits at Farm Street, for the purpose of the Community, and that such a gift is contrary to s. 28 of the statute of 1829 (10 Geo. 4, c. 7), the Act for the relief of His Majesty's Roman Catholic subjects, the effect of which it is said was maintained, or indeed interpreted, by 7 & 8 Vict. c. 97, s. 15.

On the other hand, it is argued in support of the bequest that it is a good gift to the Superior of the Farm Street Church, who is indicated by his office, but takes personally. Alternatively, that it is a good gift (*a*) for the Church, or (*b*) for the members of the Society, individually, who were members at the date of Miss Gardner's death, or (*c*) that it is good even if it be for the Society of Jesus at large, or to the branch resident in Farm Street.

The first step towards solving these problems is to determine the construction to be put upon the terms of the will. This is not an easy task.

The learned judge has set out the facts relating to the constitution and government of the Society of Jesus. It is unnecessary to repeat them, but they render it unlikely that the testatrix intended to benefit the whole Society, rather than those members of it who were, or would be at the moment of the legacy falling due, associated with the Church where she had been received into the Roman communion, and of which she speaks with reverence and gratitude. Next the donee of her residuary estate is thus designated: "To the Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, to the Superior of that Church at the moment of the legacy falling due," a persona designata by his office, and that office, one held in connection with the Farm Street Church. The alternative to this office-bearer, should the office be vacant, is " any other representative Father of the Order of the Society." Representative of what ? Holding as I do that the testatrix did not intend by the Society to refer to the totality of the Society, but only to the Farm Street portion of it, I take the word " other " as indicating

an alternative person who, like the first person designated, was representative of the same Farm Street portion. By this reasoning I come to the conclusion that "Members of the Society serving the Jesuit Church at Farm Street" is the assemblage of persons in whom the testatrix was interested, and that the Superior is singled out in his representative capacity as the donee, or failing him—if the post is temporarily vacant, or he be for some other reason not available—some other Father representative, like the Superior, of the Community at Farm Street. Such a donee, taking this in a representative capacity of the particular community or assemblage indicated, could be asked and directed not unreasonably—if Miss Gardner had died before the testatrix, or before the payment of the two particular legacies—to become responsible for the payment of these two legacies. In view of the intention I have attributed to the testatrix from the words used in reference to the main disposition of the residue, in which the Farm Street Church is plainly indicated as the central point of interest, I feel that it would not be right to impute to her from the use in reference to the legacies of the words "shall be paid . . . . by the Society of Jesus," a meaning that these words must be held to characterize the main disposition by a sort of refracted light or interpretation arising from them.

But upon this view of the disposition, does the donee take for his individual benefit, as the judge appears to hold, or is there any and what trust indicated for which the Father Superior is trustee? By the same reasoning whereby I have reached my conclusion as to the person indicated, I find it impossible to hold that the bequest was an individual and personal gift. I have already dwelt upon the words "other representative Father." If representative in the one case, so also representative in the other: that is to say representative of the Church at Farm Street and its work which the testatrix found so beneficial to herself.

It is clear from the case of *Carbery* v. *Cox* (1) that a gift to a principal officer of a Community for a valid charitable

(1) (1852) 3 Ir. Ch. Rep. 231.

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purpose is good: see also *In re Greene.* (1) There is prima facie therefore no objection to the Superior, or other representative Father, being a trustee.

In *Liston* v. *Keegan* (2) it was held that a trust for the benefit of a Church belonging to the Society of St. Vincent de Paul coming into the United Kingdom after the Act of 1829 was void. But the maintenance of religious services tending directly or indirectly towards the instruction or the edification of the public is a good charitable purpose: see per Wickens V.-C. in *Cocks* v. *Manners.* (3) The emphasis is upon the edification or instruction of the public, as pointed out by Farwell J. in *In re Delany* (4) in contradistinction to "attempting to improve one's own mind or save one's own soul."

If *Liston* v. *Keegan* (5) were still good law, it would be an authority directly against the validity of the gift by Miss Barclay to the Father Superior for the Farm Street Church. But the consideration of it led Joyce J. to say: "I must say I should think these decisions about churches very doubtful": see *In re Smith.* (6) *Liston* v. *Keegan* (5) is submitted to a careful examination by O'Connor M.R. in *In re Greene* (7), and I follow and agree with his reasoning and conclusion that the decision in *Liston* v. *Keegan* (5) cannot now be accepted. It appears to me that the judgment of the Master of the Rolls in *In re Greene* (7) is correct and I accept the decision, following as it does the reasoning of Joyce J. in *In re Smith.* (6) The result of this is that a trust for the maintenance and improvement of a Church which is open to the public—as the Church at Farm Street is—is good, and not to be held void under s. 28 of the Act of 1829.

To my mind it is clear that the testatrix intended to benefit the Church at Farm Street to which she felt a particular and lasting obligation. There can be no question that her intention could have been effected if her will had

(1) [1914] 1 I. R. 305, 312.
(2) (1882) 9 L. R. Ir. 531.
(3) L. R. 12 Eq. 574, 585.
(4) [1902] 2 Ch. 642, 648, 649.
(5) 9 L. R. Ir. 531, 539.
(6) [1914] 1 Ch. 937, 950.
(7) [1914] 1 I. R. 305, 315, 316.

been made after the passing of the Roman Catholic Relief Act, 1926 (16 & 17 Geo. 5, c. 55). It is satisfactory that this Court is not compelled to defeat the testatrix's wishes expressed in 1903, but taking effect in 1928, more than fifteen months after the Relief Act received the Royal Assent, by reason of a section in a statute now a hundred years old which has never been enforced in its apparent strictness or severity.

The declaration made by the learned judge should be varied by striking out the last six words "absolutely and free from any trust," and substituting therefor "upon trust to apply the same for the benefit of the Church of the Immaculate Conception, Farm Street, London, as he may in his discretion think fit." The costs of all parties to this appeal as between solicitor and client should be paid out of the residuary estate of the testatrix.

LAWRENCE L.J. The question on this appeal is whether on the true construction of the will of the testatrix her residuary estate is bequeathed to Father Steuart for his own use and benefit or upon some and what trusts; and in the latter case whether such trusts are valid. In the year 1894 the testatrix was received into the Roman Catholic Faith at the Church of the Immaculate Conception in Farm Street, Berkeley Square, London. This Church belongs to the Order of the Society of Jesus, and is open to the public. It is served by a community of Priests of the Order, known as the Farm Street Community, whose members, to the number of twenty or thereabouts, reside together in a house near by. The testatrix made her will in 1903 and died in France in 1910. The tenant for life died in 1928. Father Steuart was the Superior of the Farm Street Church at the time of the death of the tenant for life. He did not know the testatrix. He, like all the other Priests of the Order, was bound by monastic vows.

Tomlin J. held that the residue was bequeathed to Father Steuart for his own use and benefit. I am unable to agree with this view. The indications contained in the will that

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the gift was in respect of the office held by the legatee and that the office was not merely mentioned in order to describe the legatee, who was to take for his personal use, are in my opinion too strong to admit of the construction placed upon it by the learned judge. Not only is the legatee described by his office without mentioning his name, which of itself might not be sufficient to prevent him from taking for his own benefit, but the testatrix directs the Society of Jesus to pay the pecuniary legacies given to the two French priests in the event of the death of Agnes Mary Gardner, and concludes her will by stating that it was through the Society that she received the grace of the Roman Catholic Faith, thereby showing that the gift was prompted by gratitude to the Society. In view of this direction and statement, I am of opinion that the correct interpretation of the will is that the Superior of the Farm Street Church or other representative Father, as the case may be, was not intended to take the residue for his own use and benefit.

The question then arises what are the trusts upon which Father Steuart takes the residue? Four alternative views have been presented to us by counsel. On behalf of the appellant it is contended that Father Steuart takes the residue as trustee for the Order of the Society of Jesus generally or alternatively as trustee for the Farm Street Community as such. On behalf of Father Steuart it is contended that he takes it as a trustee for the Farm Street Church or, alternatively, for the individual members of the Farm Street Community living at the date of the death of the tenant for life.

In my opinion, the nature of the office in respect of which the bequest is made determines the trusts upon which it is to be held. I construe the will to mean that if, when the gift takes effect in possession, there be a Superior of the Farm Street Church, the residue is to go to him in his character of Superior of that Church; but that, if at that time there should happen to be a vacancy in that office, then the residue is to go to any other Father of the Order of the Society of Jesus who for the time being represents or acts as the

Superior of the Farm Street Church; and that in either case the recipient is bound to apply the residue for the benefit of that Church, and for no other purpose.

The contention that the testatrix intended to create a trust in favour of the Order of the Society of Jesus generally no doubt derives some support from the direction as to the payment of the two legacies and from the concluding sentence of the will; but, in my opinion (apart from the inherent improbability that the testatrix intended to benefit the Order at large, whose headquarters are in Rome and whose members, numbering nearly 20,000 persons of all nationalities, are scattered all over the world), the references in the will to the Society are not sufficient to outweigh the fact that the residue is given in clear terms to the Superior of this particular Church, and not to the Society of Jesus. I am unable to accept the suggestion that the Superior, or other representative Father, was merely nominated as the person to give a receipt for the legacy on behalf of the Society. If the testatrix had desired to leave her residue to the Society, it is difficult to understand why she did not say so. The direction to the Society to pay the legacies and the reference to the Society at the end of her will, are explicable on the ground that the Church which the testatrix intended to benefit belongs to the Society, and that therefore the testatrix was benefiting the Society by leaving her residue to be applied for the benefit of that Church, and was in that manner showing her gratitude for having received the grace of the Roman Catholic Faith through the Society.

The contention that the gift was either to the Farm Street Community as such or to the individual members of that Community cannot in my opinion be supported. This Community is not mentioned in the will, and the will contains no indication that the testatrix intended to benefit either the Community as such, or the individuals composing the Community. There is no evidence that the testatrix was ever interested in the activities of this Community other than those connected with the Farm Street Church, and I cannot accept the theory suggested by the learned judge that to

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the testatrix the Society of Jesus meant the Farm Street Community.

There remains the question whether a bequest for the benefit of a Church belonging to a monastic order but open to the public is valid. There are several Irish cases in which it was apparently held that a gift to such a church is void: see for example *Sims* v. *Quinlan* (1); *Kehoe* v. *Wilson* (2); and *Liston* v. *Keegan*. (3) Joyce J. in *In re Smith* (4) considered the decisions in these cases very doubtful, and his criticisms upon them led O'Connor M.R. in *In re Greene* (5) to review all the Irish cases on this subject. In *In re Greene* (5) the testatrix directed her residue to be applied "for the decoration or improvement of the Roman Catholic Church of the Carmelite Fathers at Clarendon Street in the City of Dublin." The Master of the Rolls held that this bequest was a valid charitable bequest and was not void under the Roman Catholic Relief Act, 1829. The grounds of his decision may be summarized as follows: that the Act of 1829 did not prohibit monastics from acquiring property in the United Kingdom and that it was not the function of the Court to inflict on monastics unspecified penalties, in the shape of civil disabilities, in addition to the particular penalties imposed by the Act; that neither the Act of 1829 nor the proviso to s. 15 of the Act of 1844 operated to render void a bequest in favour of persons bound by monastic vows unless the bequest were made for an illegal purpose; that a community illegal as such might be made the recipient of a bequest expressly devoted to a lawful purpose which the community was bound to carry out; that a bequest for the maintenance of a Church whose purpose is public worship is a lawful charitable bequest although the Church belongs to a monastic order; that in such a case it is the public who are the charitable objects and the legatees are only the administrators of the charity. The Master of the Rolls in the course of his judgment points out that it is obvious that a

(1) (1865) 17 Ir. Ch. Rep. 43.
(2) (1880) 7 L. R. Ir. 10.
(3) 9 L. R. Ir. 531.
(4) [1914] 1 Ch. 937.
(5) [1914] 1 I. R. 305.

bequest to aid the admission of young priests into a monastic order is in direct violation of s. 33 of the Act of 1829, and is quite different in character from one for the benefit of a church the property of a monastic order. In my judgment the reasoning of the Master of the Rolls, which accords with the view evidently taken by Joyce J. on this subject, is sound and applies directly to the bequest in the present will. It follows that in my opinion the gift of the residue to Father Steuart upon trust for the benefit of the Farm Street Church is a valid charitable bequest. In these circumstances the wider question whether, if the bequest had been to the Farm Street Community as such, or to the Order of the Society of Jesus at large, it would have been valid, does not arise, and I prefer not to express any opinion upon it.

In the result I agree with the order proposed by the Master of the Rolls.

RUSSELL L.J. In this case Tomlin J. saw his way to construe the gift in the events which happened as a gift to Father Steuart free from any trust. For myself I find the language used by the testatrix too strong for me to adopt the same view.

The gift is to a person to be ascertained in a particular way, who may, and in all probability will, be quite unknown to and unconnected with the testatrix. This fact, though it renders unlikely an unfettered beneficial gift to the donee, would be insufficient without further context, to establish a trust. In this will there are to be found three important features. First, the testatrix explains the reason of the gift—namely, gratitude to the Society of Jesus for her receipt of the grace of the true faith. Secondly, the gift is to a person holding an official or representative character. Thirdly, the testatrix, by her direction that in a certain event the Society of Jesus shall pay two donations, shows that in her view the Society is interested in the gift of her residuary estate. Reading the will as a whole and giving proper effect to the language used, I feel constrained to come to the conclusion that Father Steuart takes the residue not for his own benefit, but subject to a trust.

C. A. 1929 BARCLAY, *In re.* GARDNER *v.* BARCLAY. STEUART *v.* BARCLAY. Russell L.J.

The question then arises, what trust is applicable to the residue? Tomlin J. took the view that if any trusts applied, they were trusts for the personal benefit of the individuals who were members of the Community of Jesuits at Farm Street, at the death of the tenant for life; and that, upon the authority of such cases as *Cocks* v. *Manners* (1) and *In re Smith.* (2) I am unable, however, to find in this will any trust for the community at Farm Street. There is no such express trust, nor do the references to the Society of Jesus justify, in my opinion, any implication of such a trust. The learned judge took the view that the Society of Jesus meant to the testatrix the particular section of it composed by the community at Farm Street; and that her references to the Society were references only to Farm Street. I can find no support of this theory in the language which the testatrix has used, and I feel unable to adopt it.

I agree however with the learned judge that the testatrix does not indicate any desire to leave the property to the Order at large. Had she wished to do this, nothing would have been easier than to say it; her will, be it observed, suggests an author quite ignorant of any difficulties which may be in the path of such a disposition. What she does show clearly enough is a desire to leave her property to some one who represents the Farm Street Church: either the Superior of the Church at the given moment, or if at the moment there happens to be no such Superior, then to any other Jesuit Priest who represents the Farm Street Church. That is the way in which I construe the alternative gift. Father Steuart accordingly takes the property because, and only because, he was, at the given moment, the representative of the Farm Street Church. The gift should accordingly be construed as a gift to him as trustee to be applied by him as trustee for the purposes and benefit of the Farm Street Church. The Church is open to the public and is managed and used for the practice and advancement of the Catholic Religion. The gift is therefore good as a charitable gift. If this gift to Father Steuart be construed (as I construe it) as

(1) L. R. 12 Eq. 574. (2) [1914] 1 Ch. 937.

a gift for the purposes and benefit of the Farm Street Church, every word of the will is satisfied and explained. Gratitude to the Society of Jesus is satisfied by the gift to one of its Churches; and the direction as to the legacies is explained by the fact that the Society is, through one of its Churches, interested and concerned in the disposition of the residue.

There might at one time have been a doubt whether the fact that the public church to be benefited by the gift belonged to the Order of the Society of Jesus, or to some other order of men bound by vows, rendered the gift void. No case in this country had so decided. Certain decisions in the Irish Courts had been considered as laying down that a gift for the benefit of a church open to the public, but belonging to such an order, would be bad. Joyce J. expressed the view that these decisions were open to question: *In re Smith.* (1) Any doubt was, in my opinion, removed by the judgment and decision of the Master of the Rolls in Ireland in *In re Greene.* (2) In that case the Master of the Rolls reviewed all the previous authorities and held that a gift for the benefit of such a Church was valid. I find his reasoning quite convincing. Indeed his reasoning affords grounds for doubting whether a gift in favour of such an Order is necessarily invalid.

In the view which I take of the meaning of this will, that interesting question does not arise. Indeed it is to be hoped that it may now never arise owing to the fact that in 1926 the legislature of this country realized the propriety of repealing those penal sections of 10 Geo. 4, c. 7, which, owing to the good sense of the authorities, had never been put into force.

In the result I would vary the order of Tomlin J. in the manner indicated by the Master of the Rolls.

Solicitors for the plaintiff: *Donaldson & Co.*

Solicitors for the next of kin: *Bridges, Sawtell & Co.*

Solicitors for the personal representative of the testatrix's executrix: *Donaldson & Co., for Slade, West & Byrde, Swanage.*

(1) [1914] 1 Ch. 937, 950. (2) [1914] 1 I. R. 305.

H. C. G.

ROMER J.
1929
April 24, 25.

In re SILVA.

SILVA *v.* SILVA.

[1929. S. 497.]

Lunacy—Person of unsound Mind not so found—Purchase of freehold House as Residence—Order of Master—Rights of Heir and Next of Kin.

In 1924, by an order of the Chancery Division, funds in Court belonging to E. J. S., a person of unsound mind not so found, were invested in a freehold house as a residence for E. J. S. The order did not say whether the house was to be regarded as real or personal estate. The house was sold, pursuant to an order of the Master in Lunacy, in 1927, and the proceeds of sale were invested in 3½ per cent. Conversion Stock. E. J. S. died in 1928, a widower and without issue:—

Held, that the freehold house became the real estate of E. J. S., and that the proceeds of sale retained the character of real estate, and passed to the heir at law.

Attorney-General v. *Marquis of Ailesbury* (1887) 12 App. Cas. 672 discussed.

In re Searle [1912] 2 Ch. 365 followed.

Adjourned Summons.

In 1887 a share of certain funds to which E. J. Silva, a person of unsound mind not so found, was entitled was paid into Court to the credit of "*In re* Silva. In the matter of the trusts of the funds bequeathed by the wills of E. Silva and T. P. Silva in favour of E. J. Silva, and the Trustee Relief Act, 1847 (10 & 11 Vict. c. 96)."

In September, 1923, A. M. Silva, the wife of E. J. Silva, purchased a freehold house at Sanderstead, Surrey, as a residence for her husband and herself, for the sum of 975*l.*, and she borrowed that amount in order to complete the purchase. By an order of the Chancery Division dated January 16, 1924, A. M. Silva by her solicitors undertaking to hold the messuage as trustee for and as a home for E. J. Silva, and to execute a declaration (to be endorsed on the conveyance to her) that the premises were held by her in trust for her husband, the purchase was approved and the premises declared to be held by A. M. Silva as trustee for E. J. Silva, and part of the funds in Court were directed to be sold and applied for payment of the costs, and for the

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purchase moneys which had been borrowed by A. M. Silva. On April 9, 1924, a memorandum was endorsed on the conveyance of the premises to A. M. Silva whereby she declared that she stood seised thereof in trust for E. J. Silva, his heirs and assigns, and she thereby agreed to convey the hereditaments, at the request and cost of E. J. Silva, to such person or persons, at such time or times and in such manner as E. J. Silva should direct or appoint. A. M. Silva died on October 19, 1926. By an order under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116, dated January 20, 1927, the plaintiff was appointed receiver to the estate of E. J. Silva. By an order dated April 8, 1927, it was ordered that, notwithstanding the order of January 16, 1924, the plaintiff should be at liberty, as administrator of the estate of A. M. Silva for the use and benefit of E. J. Silva, and until he should become of sound mind, to deal with the house as the Master, mentioned in the Lunacy Act, 1890, and amending Acts, might direct. By an order dated September 8, 1927, the plaintiff was ordered, subject to the approval of the Master, to sell the house at Sanderstead, the proceeds of sale to be lodged in Court to the credit of E. J. Silva, to be invested in 3½ per cent. Conversion Stock, as directed in the payment schedule to the order. The house was sold on October 13, 1927, for the sum of 800*l.*, and the net proceeds of sale lodged in Court to the credit of E. J. Silva, and invested in the purchase of 963*l.* 12*s.* 4*d.* 3½ per cent. Conversion Stock. E. J. Silva died intestate on August 17, 1928, a widower and without issue.

A question was raised whether the Conversion Stock was real estate at the date of the death of E. J. Silva, or whether it should be treated as personal estate. The plaintiff thereupon took out this summons asking whether the sum of 963*l.* 12*s.* 4*d.* 3½ per cent. Conversion Stock, paid into Court *In re* the Lunacy Act, 1890, and *In re* Silva, was, at the date of the death of E. J. Silva, his real estate and devolved on his heir at law by virtue of s. 51, sub-s. 2, of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), or whether it formed part of and devolved as his personal estate.

J. M. Paterson for the plaintiff.

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C. R. R. Romer for the heir at law. The effect of the order of January 16, 1924, was to take part of the personal estate of the lunatic and convert the proceeds of sale into real estate. The Court has power to effect a complete alteration in the character of a lunatic's estate, and once converted it cannot be reconverted later: s. 123, sub-s. 1, of the Lunacy Act, 1890. The matter is very fully dealt with in *Attorney-General* v. *Marquis of Ailesbury* (1), where the personal estate was held not to have been converted. In that case, however, the orders contained a declaration that the lands purchased should "to all intents and purposes be considered as part of the personal estate" of the lunatic. There is no such declaration in the order of January 16, 1924. *In re Searle* (2) is an authority for the proposition that where the order is silent the character of the property is changed. The next of kin cannot claim any part of the proceeds of sale of the house at Sanderstead.

F. E. Farrer for the next of kin. Having regard to *In re Tuer's Will Trusts* (3) and other cases it cannot be denied that the Court of Chancery has power to invest the capital money in Court of a person of unsound mind in the purchase of a freehold house for his personal residence. The Court has no power, however, to invest the money of an adult person of unsound mind in the purchase of a house as a permanent investment. There is no precedent for that. The Court of Chancery cannot have greater power than the Lord Chancellor or the Lords Justices in Lunacy entrusted with the King's Prerogative in Lunacy: see Lord Macnaghten in *Attorney-General* v. *Marquis of Ailesbury*. (4) Having regard to that case it is impossible to deny that the Lords Justices in Lunacy have power not only to buy a house as a residence for a person of unsound mind, but also to buy real estate as a permanent investment for him. That power, however, should only be exercised for special reasons, and on the deliberate intention of the Court to that effect appearing: see Lord Selborne in *Attorney-General* v. *Marquis of Ailesbury*. (5) An infant has

(1) 12 App. Cas. 672.
(2) [1912] 2 Ch. 365.
(3) (1886) 32 Ch. D. 39.
(4) 12 App. Cas. 688 et seq.
(5) 12 App. Cas. 683.

a right to have the character of his personal estate invested in land preserved, so that at twenty-one he can claim it as personalty if he likes, and so that if he dies under twenty-one the devolution shall not be altered, and that right is not lost by the Court omitting express words of preservation: *Ware* v. *Polhill* (1); *Sergeson* v. *Sealey*. (2) So a person of unsound mind has prima facie the right to have the character of his property preserved to await his recovery and his own election. Where the person of unsound mind, while free, has himself contracted to purchase, he has manifested his personal election for conversion, and his election will not be interfered with: *Baldwyn* v. *Smith*. (3) Here the Master expressly sanctioned the investment of the money in the purchase merely of a home, a temporary purpose, for E. J. Silva; he never intended to turn the personal estate into real estate.

ROMER J. The question which I have to determine is whether, as a result of the order of January 16, 1924, the amount raised out of the fund in Court which was personal estate, became, by virtue of the order, converted into real estate in the eyes of a Court of Equity, as, of course, it was in fact in law, or whether the house so purchased ought to be regarded by a Court of Equity as still remaining part of the personal estate of the person of unsound mind. If the Court had desired that the house should still form part of the personal estate, there is a well known form of declaration which could have been inserted in the order, and which would have effected that result.

It will be observed however that the order is entirely silent on the point. Notwithstanding this, Mr. Farrer contended that the house was still to be regarded as part of the personal estate of the patient. He said that in all cases where the personal estate of a lunatic is laid out by the direction of the Court, whether by the Court of Chancery, by the Lords Justices in Lunacy or otherwise, the real estate so purchased is to be regarded as the personal estate of the

(1) (1805) 11 Ves. 257, 278. (2) (1742) 2 Atk. 411, 412–3; 2 Mod. 370.
(3) [1900] 1 Ch. 588.

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lunatic, and that the onus is upon the persons who assert that land so purchased is real estate, to show positively from some expression in the order or from the surrounding circumstances that it was the intention of the Court that that result should follow. If that contention were sound one would expect the law to be so laid down in *Attorney-General* v. *Marquis of Ailesbury* (1), which is the leading case on the subject. In that case the money of a lunatic was invested by his committees, by order of the Lords Justices, in purchase of lands, which under their Lordships' direction, were conveyed to the committees, "their heirs and assigns upon trust for" the lunatic, "his executors, administrators and assigns," with a declaration that the lands so conveyed should "to all intents and purposes be considered as part of the personal estate of" the lunatic. The House of Lords held that the lands were part of the personal estate of the lunatic. It was, therefore, a case in which the order contained the well known declaration to which I have referred. When the speeches are looked at it will be found that it was merely owing to the fact that the order contained that declaration that the conclusion was reached that the property was personal estate of the lunatic, and that, if the order had not contained the declaration in question, the decision would have been the other way.

It is interesting to glance at the arguments of the learned counsel engaged in that case. Towards the conclusion of his argument on behalf of the appellant, Mr. Vaughan Hawkins says (2): "The declaration that the property is to be considered as personalty is sufficient without an express trust for sale; it is equivalent to a direction that the land shall be sold at some time or other." For the respondents it was contended that (3): "The declaration could not effect a conversion without a trust to sell. The opinion of the editor of Jarman on Wills, that the declaration implies such a trust, is not supported by the authorities cited." Each of the learned counsel was therefore directing the attention

(1) 12 App. Cas. 672. (2) 12 App. Cas. 677.
(3) 12 App. Cas. 678.

of the House to the express declaration—one urging that it had the same effect as a trust for sale, the other that it had not.

Lord Selborne said this (1): "And although I do not think it is open to dispute that the Lords Justices, in the due course of the administration of his estate in lunacy, might have done any act which they judged to be for his benefit, it is to me clear that, in this case, they did not judge it necessary, or for his benefit, to do any act which would have the effect of converting his personal right to the money thus invested into a real right to land with the incidents belonging to realty; but that, on the contrary, they intended to prevent the investment which they authorized from having any such consequence, and introduced both into their own order, and into the conveyance which followed thereon, declarations which they considered proper and sufficient to effectuate that intention." He also said (2): "The Lord Chancellor and the Lords Justices in Lunacy, high as are their functions, and regulated as those functions are by statute, act not as proprietors, but only as guardians and administrators of the lunatic's property; and, whatever power they may have to convert any part of it from realty into personalty, or from personalty into realty, when judging this to be for his benefit, and deliberately intending to do so, it is, in my opinion, neither necessary nor right to ascribe that effect to an investment which they have authorized on the terms, and with the declared intention, that it should not have that consequence. If an investment, de facto, in land may leave the original personal right to the money invested unchanged in equity, for want of authority in the persons making that investment to change it, so (in my judgment) may a similar investment, made under the direction of a Court, which declares, both in the order and in the conveyance, that it intends the personal right to remain unchanged, and does not mean to exercise any authority which it may possess to change it." Then, after referring to certain authorities relating to lunatics and infants, including

(1) 12 App. Cas. 680. (2) 12 App. Cas. 681.

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Witter v. *Witter* (1), a decision of Lord King's, he said (2): "Lord King there pointed out, as proper to preserve the personal character of the right during infancy, the same form which was afterwards used by the Court in the case of *Bridges* v. *Bridges* in 1752 (3); and which was followed with approval by Lord Eldon in 1801 (in *Ashburton* v. *Ashburton* (4)) expressly to prevent the Court from 'changing the nature of the property.' That form was for a long period of time, and under very great judges, sanctioned by the general course of the Court of Chancery in such cases. I do not see how your Lordships could now hold a trust, declared in such terms, to be ineffectual for the preservation of the personal right, with its proper incidents (of which the devolution of the equitable title to executors or administrators was certainly not the least important, nor the least distinctly in view), without practically declaring that all those judges were mistaken, and that the course of the Court of Chancery, in those cases, proceeded upon a misconception of the powers of the Court, and of the effect in equity of what it authorised to be done." Now I read that passage as indicating that just as a Court of Equity, in cases where an express trust for sale is imposed on the land, treats it as personal estate, so a Court of Equity treated land purchased under its direction as also possessing the character of personal estate where there was to be found such a declaration or direction as Lord Selborne was referring to. In such a case it was not necessary to have an express trust for sale, for the same effect was produced by the property being directed to be held in trust for the lunatic, his executors, administrators and assigns. I cannot find in Lord Selborne's speech anything whatsoever to suggest that where an order approving a sale is silent upon the matter the same result follows. On the contrary it appears to me that Lord Selborne entertained precisely the opposite opinion.

Lord Macnaghten took the same view. He said (5): "The principles on which the Court acts in dealing with the property

(1) (1750) 3 P. Wms. 99.
(2) 12 App. Cas. 682.
(3) Seton on Decrees, 2nd ed., p. 345.
(4) 6 Ves. 7.
(5) 12 App. Cas. 688.

of lunatics under its care are not open to question. The leading principle, the paramount consideration, is the interest of the lunatic. Consistently with that principle it is settled that in the ordinary course of managing a lunatic's estate, the Court pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the Court so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession." There Lord Macnaghten points out that when land is acquired in the ordinary course of the management of the lunatic's estate for the lunatic's benefit, the Court pays no attention to the interests or expectations of those who come after the lunatic, and does not trouble to provide that real estate so purchased shall be treated as personal estate ; but that when, on the other hand, real estate is purchased out of personal estate, otherwise than in the ordinary course of management, it is the duty of the Court not to disturb its character. Then Lord Macnaghten said (1) : "Now let me invite your Lordships' attention to what occurred on the occasion of the purchase. It appears that in 1866 the Wootton Bassett estate was for sale. It was considered a very desirable property. The price was over 200,000*l*., but there were ample funds resulting from the accumulation of income from the brewery business standing to the credit of the lunacy. Under these circumstances the committees of the lunatic's estate presented a petition asking for leave to buy the property on behalf of the lunatic. It was not disputed at your Lordships' bar that the Court had power to sanction the purchase. Whatever the origin of the power may have been it is too late to dispute its existence. But unquestionably such a purchase was altogether outside the ordinary course of administration of a lunatic's estate, and therefore, as it seems to me, if the Court thought fit to sanction the purchase, it was bound to take care that the character of the lunatic's property was not altered." Thus Lord Macnaghten is pointing out that in

(1) 12 App. Cas. 691.

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the case before him the purchase was outside the ordinary course of management, and that one would therefore have expected to find some direction preserving or treating the real estate so purchased as personal estate of the lunatic. The case was, therefore, one in which, in construing the order, one could more readily come to the conclusion that the real estate was to be treated as personal estate than would have been the position if the purchase had been made in the ordinary course of management.

In the present case the purchase was made in the ordinary course of management. It was essential for the well being of the patient that a house should be provided in which he could live, and the Court need not be expected to have had any regard for the interests of those coming after him any more than he himself, when buying such a house, would consider whether, if he died intestate, the house would devolve upon his heir at law or his next of kin. Lord Macnaghten then proceeded to consider the terms of the order before him. He said (1): "Knight Bruce and Turner L.JJ., sitting in lunacy, approved the purchase and declared it to be for the benefit of the lunatic, proceeding, I presume, upon the footing that the proposed expenditure was an outlay which a person of sound mind in the pecuniary position of Sir Henry Meux might not unnaturally consider desirable in the interests of his family. At the same time they laid down the conditions on which the purchase was sanctioned, and they prescribed the form of the conveyance. The property was to be conveyed to trustees 'upon trust for Sir Henry Meux, his executors, administrators, and assigns,' with a declaration that the estate was 'to be considered as part of the personal estate of Sir Henry Meux.'

"If it had not been for the judgment of the Court of Appeal, I should have thought the meaning and effect of the transaction clear. The committees had no power of themselves to lay out the lunatic's personal estate in land. 'It was not in the power of any committee,' as the decree in *Awdley* v. *Awdley* (2) expressly declared, 'to alter the nature of a

(1) 12 App. Cas. 691. (2) 2 Vern. 194*n*.

lunatic's estate.' The purchase could only be made with the sanction of the Court. In giving its sanction it was surely competent for the Court to impose such terms, not inconsistent with law, as it thought right. Terms so imposed are I think to be treated as binding and effectual. I read the order as authorising the proposed purchase on the terms, that the money to be laid out in the purchase was to retain its character, and that the property was to be conveyed to trustees upon trust to be held and applied as part of the lunatic's personal estate, which the Court then and there declared it to be. The language of the order seems to me to be framed for the purpose of impressing upon the property to be purchased the character of personal estate from the moment of the purchase, during the lunatic's lifetime, as well as after his death. The conveyance carries out the order of the Court in terms. It recites the order. It conveys the property precisely as the Court directed it to be conveyed. It repeats the declaration which the Court prescribed, and which is none the less the declaration of the Court because it is embodied in the conveyance. A trust for sale would have made the conveyance no better and no worse. Practical effect under the circumstances it could have none. I do not see why a sort of magical effect should be attributed to it." Now it is impossible to suppose that a judge who used that language was of opinion that if the order had been silent the same result would follow.

But not only is it, I think, to be inferred from the decision of the House of Lords that Mr. Farrer's contention is not sound. There is actual authority to the contrary. In *In re Searle* (1) Joyce J. had to deal with a case in which a lunatic was possessed of some leasehold property. By the direction of the Master a receiver of the lunatic's estate had been given permission, on behalf of the lunatic, to purchase a reversion in fee of the leasehold hereditaments in consideration of a yearly rentcharge, and the result of the purchase and conveyance of the reversion in fee was that the leasehold became merged in the freehold. In those circumstances

(1) [1912] 2 Ch. 365.

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Joyce J. was asked, on the death of the lunatic, to decide whether the leasehold property was converted into real estate or devolved upon the next of kin, the order being silent as to preserving the rights of the next of kin. Joyce J. decided against the contention of the next of kin. He says this (1): "I find in Heywood and Massey's Lunacy Practice, 4th ed., pp. 184, 185, under the head 'as to the purchase of real estate on behalf of a lunatic,' this statement: 'The Masters have jurisdiction, under the sections of the Lunacy Act, 1890, dealing with management and administration, to sanction the purchase of real estate on behalf of a lunatic. But such sanction will only be granted under special circumstances, e.g., when it is desirable to purchase a house for the lunatic's residence, or a piece of land is required to round off an estate' —the present case seems to me to be analogous to that— 'and complete a series of transactions commenced by the patient when sane. A satisfactory title to the real estate must be shown. There is no conveyancing counsel to the Lunacy Office: but the Masters generally direct that counsel shall advise both on the contract for purchase and the abstract of title. The order for purchase is drawn so as to protect the interests of persons who may be entitled on the death of the patient to share in his estate and to preclude any advantage to the heir at law at the expense of the next of kin. The conveyance will be to the committee or receiver *in trust for* the lunatic, *his heirs, executors, administrators, or assigns, regard being had to the source from which the purchase-money was derived.*' Although that is the rule it is within the power of the Court, in Lunacy, to alter the nature and consequent devolution of the estate of the lunatic. In the present case the order says nothing as to preserving the rights of the next of kin, the reason of which may very probably be that it was not considered worth while to preserve them. It was thought to be for the benefit of the lunatic's estate that the lease should be surrendered in exchange for a conveyance of the premises in fee subject to the payment of a perpetual rentcharge. The Court had power to make such an order,

(1) [1912] 2 Ch. 369.

and I do not propose to say that the order in this case was not properly made. The Master who made the order knew what he was doing, and I think I must give effect to it. I do not say that the leasehold was 'converted'—which is the word used in the summons—but I hold that the lease merged in the freehold reversion, and the premises, 33 Union Street, which were in fact freehold at the death of the lunatic, passed as such to her heir."

It was pointed out by Mr. Farrer in his argument that in that case the Master, when settling the order, had expressly sanctioned a conveyance containing a provision that the hereditaments purchased should stand limited "subject to the lease and the term thereby created but to the intent that the same and the unexpired residue of the term might merge and be extinguished" and Mr. Farrer asked me to come to the conclusion that in consequence of that direction that case was no authority for the general proposition that where the order is silent it is impossible to treat the property as not being real estate. But all that the Master directed was that the conveyance should be in the form which was appropriate for carrying out the transaction, which would necessarily involve extinguishment and merger in freehold, and in so directing he was expressing no intention whether the real estate so acquired should or should not be regarded as real or personal estate any more than, when a Master in Lunacy directs personal estate to be laid out in the purchase of real estate, he thereby expresses any opinion as to whether the real estate so purchased is to be regarded in equity as real or personal estate of the lunatic. In both cases he merely directs that what was previously personal estate of the lunatic shall henceforth be represented by what is real estate in law. The order in the present case was silent, and being silent, it seems to me to follow that the real estate must be treated as what it is in fact—namely, real estate and not personal estate.

The only other case to which it is necessary to refer is *Ware* v. *Polhill* (1), in which there is a dictum of Lord Eldon's

(1) 11 Ves. 257, 278.

ROMER J. 1929 SILVA, *In re.* SILVA *v.* SILVA.

upon which Mr. Farrer relied. But it was a dictum relating to the then practice of the Court in relation to the management of an infant's property. It was dealing with the management of an infant's property before the passing of the Wills Act, at which time the practice relating to infants was different from that relating to lunatics. Since the Wills Act the practice appears to be precisely the same in the two cases, and in my opinion that practice is the one laid down in *Attorney-General* v. *Marquis of Ailesbury.* (1)

For these reasons I have come to the conclusion that the freehold house became real estate of the person of unsound mind as at the date of its acquisition, and it is not disputed that in that event the proceeds of the subsequent sale retain the character of real estate, and pass to the heir at law.

Solicitors: *Haines & Wedlake; Bell, Brodrick & Gray.*

P. J. B.

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In re LOWE.

STEWART *v.* LOWE.

Legitimacy—Two illegitimate Children—Subsequent Marriage of Parents—Death of one Child, leaving Issue, before January 1, 1927*—Death of Mother intestate—Right to Estate—Legitimacy Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 60), *s.* 1, *sub-s.* 1; *s.* 3, *sub-s.* 1 (*a*); *ss.* 5, 9, *sub-s.* 1.

M. E. L. had two illegitimate children, a son and a daughter, by M. L., whom she subsequently married in 1905. The son died in 1919 leaving issue. M. L. died in 1919. M. E. L. died in 1928 intestate:—

Held, that the son having died before the Legitimacy Act, 1926, came into force, his issue took no share of M. E. L.'s estate.

ORIGINATING SUMMONS.

M. E. Lowe had two illegitimate children, a son, born in 1893, and a daughter, the plaintiff, born in 1897, by M. Lowe, whom she married in 1905. At the time the children were born she was free to marry their father. The son died in 1919, leaving one child, the defendant, him surviving.

(1) 12 App. Cas. 672.

M. Lowe died in 1919. M. E. Lowe died on January 20, 1928, intestate, and letters of administration to her estate were granted to the plaintiff as the sole administratrix.

Under those circumstances the plaintiff took out this summons asking that it might be determined, whether by virtue of the provisions of the Legitimacy Act, 1926, and in particular s. 3 thereof, the plaintiff was beneficially entitled to the whole of the intestate's residuary estate, and, if not, what persons were entitled to such residuary estate, in what manner, and in what shares.

H. Gamon for the plaintiff. The plaintiff was legitimated by the Legitimacy Act, 1926, and claimed to be entitled to the whole of the estate of the intestate. The defendant claimed to be entitled under s. 9 of the Act to one half of the estate. The issue of a person who was not living at the time when the Act came into operation could not obtain the same benefit as the issue of a person who was then living could obtain. Sect. 9, sub-s. 1, was the important section. The benefit of that section depended upon the question whether the intestate left " any legitimate issue her surviving." In this case she did. The term " legitimate child " means " having the status of a legitimate child."

[He referred to the definition of " legitimacy " in the Oxford Dictionary, and to *In the Matter of the Petition of C. D.* (1)]

Blease for the defendant. The term " legitimate issue " in s. 9, sub-s. 1, meant issue " born legitimate." The plain meaning of the section was that while the descendants of an illegitimate woman were not to compete with legitimate children, there was no reason why they should not compete with her illegitimate children, whether those children were legitimated or not. The whole object of the Act was to benefit persons who, according to the strict rule of common law, would not be entitled to benefit at all. The defendant was entitled to represent his deceased parent, and to receive half of the estate.

(1) (1927) 138 L. T. 208.

ROMER J. 1929 LOWE, *In re.* STEWART *v.* LOWE.

ROMER J. I regret to say I have no doubt as to the conclusion I should come to in this case. Having regard to the words of the Legitimacy Act, it is admitted that, although the daughter was legitimated by the provisions of the Act, the son was not, and for this reason. Although it is provided by s. 1, sub-s. 1, that the marriage of parents, such as those in the present case, of an illegitimate person renders that person legitimate as from the commencement of the Act, or from the date of the marriage, whichever last happens, this benefit only attaches to the illegitimate person if living, which must mean if then living. The daughter having thus been rendered legitimate became entitled, by virtue of s. 3, sub-s. 1 (*a*), to take an interest in the estate of her intestate mother as if she had been born legitimate, but the section does not entitle the child of her brother, who died before the Act came into operation, to take any interest. Sect. 5 does to some extent remedy the hardship occasioned by confining the operation of s. 1, as it is confined in terms, to children living at the date of the contracting of the marriage, where it takes place after the commencement of the Act, but it does not apply to the case of a child dying before the commencement of the Act. If the plaintiff's brother had died after, instead of before, the coming into operation of the Act his child would no doubt have taken a share. But there is nothing in s. 5 of the Act to enable the child of the plaintiff's brother to take a share. On behalf of the defendant, however, reliance was placed on s. 9, sub-s. 1, which provides that: "Where, after the commencement of this Act, the mother of an illegitimate child, such child not being a legitimated person, dies intestate as respects all or any of her real or personal property, and does not leave any legitimate issue her surviving, the illegitimate child, or, if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate." It was contended that the mother did not leave any legitimate issue her surviving, but only a legitimated daughter. I am unable to accept this contention. Legitimacy is a question of status: see *In the*

Matter of the Petition of C. D. (1) This status of legitimacy can be obtained by being born legitimate or by being legitimated by virtue of the provisions of the Act. The plaintiff had attained that status, and it is an irrelevant consideration whether she attained it in the one way or in the other.

In these circumstances I am sorry to be obliged to hold that the whole of the estate of the intestate passes to the daughter, and that the child of the son takes nothing.

Solicitors for plaintiff: *North, Kirk & Co., Liverpool.*
Solicitors for defendant: *Charles Lightbound & Co.*

P. J. B.

GREEN *v.* WEATHERILL.

[1928. G. 874.]

Married Woman Trustee—Action in King's Bench Division—Judgment in proper Form against Married Woman—Execution ineffective—Action in Chancery Division—Res judicata.

Where the Court, in giving judgment against a married woman who is a defaulting trustee, orders that the judgment be satisfied out of her separate estate, and execution proves useless, it is not open to the plaintiff, in a new action, to obtain against her judgment in a different form for payment of the moneys into Court. As against her, the matter is res judicata. But if it appear that she has transferred the moneys to a person with knowledge of the proceedings against her, action will lie against the transferee as constructive trustee.

The plaintiff obtained against the first defendant, a married woman, judgment for payment out of her separate estate of the sum in dispute and costs. Evidence disclosed that the first defendant had parted with the whole of the sum, having transferred most of it to her sister—the second defendant—who was not a party to the proceedings but knew of them at the time. Execution in respect of the judgment thus proving useless, the plaintiff now brought this action, alleging that the first defendant had paid the money to the second defendant in order to defeat any judgment for the plaintiff, and that the second defendant received the money as constructive trustee:—

Held, (1.) that in regard to the first defendant, the matter was res judicata, as the plaintiff had already obtained judgment against her separate estate, and therefore could not now, on the same facts, obtain

(1) 138 L. T. 208.

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against her another form of judgment for payment of the moneys into Court; (2.) that judgment could be given against the second defendant, who had received the moneys as constructive trustee.

Scott v. *Morley* (1887) 20 Q. B. D. 120 and *In re Turnbull* [1900] 1 Ch. 180 considered.

In re May (1885) 28 Ch. D. 516; *Badar Bee* v. *Habib Merican Noordin* [1909] A. C. 615; *Henderson* v. *Henderson* (1843) 3 Hare, 100; and *Hoystead* v. *Commissioner of Taxation* [1926] A. C. 155 applied.

WITNESS ACTION.

The following statement of facts is taken from his Lordship's judgment :—

The plaintiff is the executor of the will of Stephen Ellis, an agricultural labourer, who died on December 3, 1925. In the present action he claims a declaration that a sum of 195*l.* 5*s.* 1*d.* forms part of the estate of the testator, Stephen Ellis, and that the defendant, Emily Weatherill, was and is a trustee of that sum on trust to pay it to the plaintiff as representing the estate of the testator. He claims also in effect to follow 135*l.* part of that sum in the hands of the defendant Sarah Croft; also an account and an order for payment of any sums found due from the defendants or either of them and costs. The defendants are the two daughters of the testator by his wife Frances Ellis who died on March 8, 1919. The dispute arises in relation to a sum of 197*l.* 16*s.*, which admittedly was standing in the name of Mrs. Ellis at the St. John's Hill, Sevenoaks, Savings Bank, and was drawn out by her on the day of her death, the main question being whether this sum was hers or her husband's (the testator). This question has already been in substance litigated in the King's Bench Division before McCardie J. in an action between the present plaintiff and the first defendant and was decided in favour of the plaintiff; but the second defendant, Mrs. Croft, was not a party to those proceedings, and accordingly it is necessary to decide the issues of fact independently of that decision.

The testator was an entirely illiterate man unable even to sign his own name. Throughout his life till shortly before his death at the age of over eighty he seems to have been in regular work as an agricultural labourer. His wife, who

lived with him, from time to time earned some money as a hop picker and in kindred ways, and she and her husband sometimes took in lodgers. The Savings Bank account above referred to was opened on December 17, 1888, with a payment in of the sum of 25*l.* It was opened in the name of the wife, Frances Ellis, a circumstance which is explained by the plaintiff as arising from the fact that the husband was unable to write. Further sums were paid in between the years 1888 and 1898, and from time to time there seem to have been some withdrawals of interest. By the year 1910 the total standing to the account was 202*l.* 11*s.* 11*d.* In the year 1915 there was a withdrawal of the sum of 50*l.*, and that appears to have been the only withdrawal of any capital sum. By March 8, 1919, the balance amounted to 197*l.* 16*s.* On that date, Mrs. Ellis being exceedingly ill and about to die, it was arranged that the sum at the Savings Bank should be withdrawn, and the defendant Mrs. Weatherill and her father went to the Post Office and received the money in notes. Mrs. Weatherill undoubtedly was handed the money by her mother and the real question is whether it was so handed to her to keep for her father, or whether, as the defendants in this action assert, it was handed to Mrs. Weatherill by her mother as the true owner, on the terms that if the testator needed any money she was to help him out of the said sum, and further that what was left of the said sum at his death was to be divided equally between the defendants. I will pause here to say that the date of the marriage of Mr. and Mrs. Ellis has not been strictly proved, but Mrs. Ellis was aged eighty-two when she died on March 8, 1919. She must, therefore, have been born in 1837, and, having regard to the age of the defendants, it is apparent that the marriage must have taken place a long time before the passing of the Married Woman's Property Act, 1882, and before the passing of the Married Women's Property Act, 1870. Mrs. Ellis having died on March 8, 1919, the sum drawn out from the Post Office, together with a further sum of 2*l.* 4*s.* given to Mrs. Weatherill by her husband, making the round sum of 200*l.*, was placed on deposit account in the

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name of Mrs. Weatherill with the Bank of Liverpool and Martin's Bank, Ld., at Bromley, Kent, where Mr. and Mrs. Weatherill were residing. Interest was allowed by the bank at varying rates. On April 12, 1924, the sum of 29*l.* 0*s.* 2*d.*, being the interest up to date, was paid to the testator. On July 25, 1925, a sum of 20*l.*, part of the capital of the 200*l.*, was drawn out and paid to the testator. Subject to those exceptions, the sum remained intact on deposit at the bank without any withdrawal. The testator, as I have said, died on December 3, 1925, having by his will dated October 16, 1925, appointed the plaintiff to be his executor and trustee. He gave all his furniture and other household effects to Harriet Sophia Weeks, a sister-in-law of the testator, who came to act as his housekeeper upon the death of Mrs. Ellis. The rest, residue and remainder of his estate "including the sum of 200*l.* which I handed to my daughter Emily Weatherill for her to invest for me and upon which she has paid during my lifetime certain sums for interest earned on the said capital sum of 200*l.*" he gave unto and to the use of his trustee upon trust, first to pay thereout all his just debts, funeral and testamentary expenses, and thereafter to divide the remainder of his residuary estate between his daughters, Sarah Jane Croft and Emily Weatherill, and the said Harriet Sophia Weeks, in equal shares.

The will was prepared by the plaintiff, who is the managing clerk to Messrs. Arthur E. Eves & Jones, the plaintiff's solicitors, and was executed by the testator as a marksman. The plaintiff after the funeral went to the house and read and explained the will to the defendants and Mrs. Weeks. The defendants were very angry, and one of them said that their father had "nothing to make a will for." Nothing whatever was said about the deposit account at the bank in the name of Mrs. Weatherill, and the plaintiff had no knowledge of it.

On December 11, 1925, the plaintiff's solicitors wrote to Mrs. Weatherill enclosing a copy of the will and asking with regard to the sum of 200*l.* deposited by the deceased that she would render an account showing the interest due to the

estate, and forward the amount due for principal and interest. The reply by Mr. W. G. Weller, then acting as solicitor for Mrs. Weatherill, was that the deceased did not at any time deposit with her the sum of 200*l.* as alleged, or any other sum, and that therefore no account could be given. Ultimately, after further correspondence, the plaintiff by a specially indorsed writ issued in the King's Bench Division on October 6, 1926, claimed as executor of the testator for money had and received by the defendant Mrs. Weatherill to the use of the deceased the sum of 200*l.*, and this was stated in the particulars to be the amount entrusted to the defendant by the deceased on or about March 6, 1919. By the defence the defendant pleaded that she did on or about April 12, 1924, give to the testator a sum of 29*l.* which was the interest from a sum of 198*l.* which had been the property of her mother and was given to the defendant by her mother in the month of March, 1919, and further that on or about July 25, 1925, the defendant gave to the testator a sum of 20*l.* out of the said sum of 198*l.* The defendant wholly denied that the sum of 200*l.* or any part thereof was deposited with her by the testator. At the trial before me the managing clerk for Mrs. Weatherill's then solicitor, Mr. Weller, was called on behalf of the defendants, and he stated during cross-examination that Mrs. Weatherill informed him that the sum of 198*l.* was the property of her mother and had been given to her by Mrs. Ellis as an absolute gift without any conditions, and this view was reflected in the defence. It will be observed that the present averments of the defendant, Mrs. Weatherill, in para. 2 of her defence are very different.

The case in the King's Bench Division came before McCardie J. for trial and the defendant and Mrs. Croft and other witnesses were called. The evidence given seems to have been substantially the same as the evidence given before me. The learned judge did not attach credit to the statements of Mrs. Weatherill and Mrs. Croft and decided in favour of the plaintiff. The formal judgment was for 198*l.* with costs, such sum and costs to be payable out of the separate estate

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of the defendant, as directed in the Associate's Certificate, and there follow the words usual in judgments against married women in the *Scott* v. *Morley* form (1). I should add that it was not till the month of December, 1927, that Messrs. Kinch & Richardson, who had been appointed to be solicitors for the defendant, as the result of a change, disclosed to the plaintiff the fact that the defendant had or had had a banking deposit receipt in respect of the sum of 200*l.* referred to in the pleadings. This document ought obviously to have been included in the affidavit of documents made by the defendant. The copy banking account was thereupon obtained by the plaintiff, and from that account it emerged that on May 24, 1927, the balance standing to that account was drawn out by the defendant, the pleadings having been closed in the previous month and the case having been set down for trial.

At the hearing before McCardie J. and also before me Mrs. Weatherill deposed that she had paid out of the sum withdrawn from Martin's Bank the sum of 135*l.* to her sister Mrs. Croft, who knew all about the proceedings, in settlement of " her share in the sum " handed to Mrs. Weatherill by her mother as alleged, and of a debt of 31*l.* 10*s.* stated, truthfully or otherwise, to have been owing to Mrs. Croft since the year 1907. She appears to have used the balance by paying a sum to her then solicitor on account of costs, and also paying 5*l.* to her husband and two sums of 5*l.* to her married daughters. An execution levied in respect of the judgment so recovered in the King's Bench Division has thus been wholly unproductive. Nor can such a judgment be enforced by process of attachment, since the married woman is a trustee and the sum is due in respect of a breach of trust : see *Scott* v. *Morley*. (1) There is I think no doubt that the King's Bench judgment was necessarily in the *Scott* v. *Morley* form: see the view expressed by Stirling J. in *In re Turnbull*. (2)

The plaintiff, having failed to recover as the result of that action, commenced the present proceedings on April 25,

(1) 20 Q. B. D. 120. (2) [1900] 1 Ch. 180.

1928, making Mrs. Croft a defendant in addition to Mrs. Weatherill; and he pleads in para. 7 of the statement of claim that the defendant Mrs. Weatherill, in order to defraud the just claim of the plaintiff to the sum in question, and in order to defeat the plaintiff's right to take the same in execution of any judgment that he might recover in the said action, withdrew all that remained of the said capital sum and paid the sum of 135*l.* to the defendant Mrs. Croft, and (para. 8) that Mrs. Croft at the time when she received the said sum of 135*l.* knew or had notice of all the facts referred to in the statement of claim.

Ronald Smith for the plaintiff. Judgment against a trustee is a judgment that he pay a sum of money. The fact that a married woman trustee disembarrassed herself of the money after action brought would not prevent the plaintiff from getting judgment. The plaintiff traced the money to her banking account: and she withdrew it while the pleadings in the King's Bench Division were pending: *National Bolivian Navigation Co.* v. *Wilson.* (1)

A. C. Edgar for the defendants. This is res judicata, and ought not to be tried again in the Chancery Division. Except for asking for a declaration, the claim is almost exactly the same as in the action in the King's Bench Division: *Hoystead* v. *Commissioner of Taxation.* (2) It has already been decided that Mrs. Weatherill is a trustee, and that cannot be decided again. All material points have been litigated before: see *Hunter* v. *Stewart* (3), which gives a definition of res judicata. [He referred also to Halsbury, vol. xiii., para. 334.]

Apart from res judicata, it is not allowed to harass a defendant by various actions. As regards Mrs. Croft, the plaintiff must prove that she knew that the money paid to her belonged to the testator's estate. Even if the Court does make an order, it will be in the form settled in *Scott* v. *Morley* (4), both the defendants being married women and having no separate estate.

Ronald Smith in reply.

Cur. adv. vult.

(1) (1880) 5 App. Cas. 176, 185.
(2) [1926] A. C. 155, 165, 170.
(3) (1861) 4 De G. F. & J. 168.
(4) Q. B. D. 120.

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MAUGHAM J. [having stated the facts:] I do not think it is necessary for me in the circumstances to analyse the evidence in any detail, for I have come to the same conclusion as that at which McCardie J. arrived on the facts of the case, and I accept the evidence given on behalf of the plaintiff. I do not think it is established that Mrs. Ellis ever had any independent savings of her own, still less that she ever intended to make a gift of them on the terms now set up by the defendants; and I am fortified in that opinion by the circumstance that Mrs. Weatherill attempted at an earlier stage to set up that the sum in question had been given to her absolutely and by the fact that although her father died on December 3, 1925, she made no attempt to deal with the money in any way or to pay over one half the fund to her sister Mrs. Croft until the King's Bench action was ripe for hearing. My conclusion is that the sum deposited in Martin's Bank at the date of the testator's death formed part of his estate.

It now becomes necessary to consider the defences of the two defendants separately. The main defence of the defendant Weatherill, having regard to my findings of fact, is the judgment in the King's Bench action for 198*l.* and costs. It is contended on behalf of the plaintiff that notwithstanding that unsatisfied judgment he is entitled to institute the present proceedings in the Chancery Division and therein to obtain an order for the payment into Court of the amount proved to have reached the hands of the defendant Weatherill as a trustee. The advantage to the plaintiff of an order in that form would be that such an order can be enforced by attachment: *In re Turnbull.* (1) The position of a married woman who happens to be a defaulting trustee is in the light of the authorities a somewhat curious one. If an order is made of which the object is to compel her to make good a loss occasioned by her breach of trust, the proper form of the order is that laid down in *Scott* v. *Morley* (2): see the judgment of Stirling J. in *In re Turnbull.* (1) If, however, the proceedings take

(1) [1900] 1 Ch. 180, 185, 186. (2) 20 Q. B. D. 120.

such a form that no breach of trust has been proved, but it is established that the defendant has in her hands moneys or property subject to the trust, and the object of the order is to get that property for greater security transferred into Court, an order in the form of *Scott* v. *Morley* (1) is inappropriate (see the words of Stirling J. (2)), and an order for attachment may then be made. It will be observed that moneys forming part of the trust do not in truth form part of the separate estate of the defendant trustee; and it would seem that the plaintiff in such a case must make up his mind whether he desires to allege and prove that the defendant has committed a breach of trust and is therefore liable to the extent of her separate estate in respect of it, or whether he desires to treat her as a trustee possessed of trust moneys which it is desired to place in safe custody.

In my opinion it must be admitted that the cause of action in the two cases is strictly speaking not the same. On the other hand, the plea of res judicata is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation: see *In re May* (3); *Badar Bee* v. *Habib Merican Noordin.* (4) In the latter case it may be observed that Lord Macnaghten in delivering the judgment cites from the Digest and relies on the maxim "Exceptio rei judicatae obstat quotiens eadem quaestio inter easdem personas revocatur." In the leading case of *Henderson* v. *Henderson* (5) there is to be found the following statement of the law by Wigram V.-C.: "I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part

(1) 20 Q. B. D. 120.
(2) [1900] 1 Ch. 180, 185, 186.
(3) 28 Ch. D. 516, 518.
(4) [1909] A. C. 615.
(5) 3 Hare, 100, 114.

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of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." This passage has recently been approved by the Privy Council in the case of *Hoystead* v. *Commissioner of Taxation*. (1)

I cannot doubt that the present claim against the defendant Weatherill is one which properly belonged to the subject of litigation raised in the King's Bench action and that the plaintiff, having recovered judgment against her by establishing that she was paid the sum of 197*l*. as a trustee and had misapplied it, is not now entitled by establishing practically the same facts to obtain judgment in a different form. The action against the defendant Weatherill therefore fails.

As against the defendant Mary Croft the position is very different. She was not a party to the previous proceedings, and it has been noticed that the payment to her of the sum of 135*l*. was not made till after the pleadings in that action were closed. In the present action she is sued as a constructive trustee of the sum so paid to her with full knowledge of the action and of the nature of the claim which was being made as to the sum deposited by her sister with Martin's Bank. In my opinion those facts having been established; she must be taken to be a trustee. It is not alleged in the action that she has committed any breach of trust, and counsel for the plaintiff would be entitled on the pleadings as they stand to ask for an account of the sum received by her with notice of the plaintiff's claim. It is not disputed that the sum paid to the defendant Mrs. Croft is the sum of 135*l*., and an account against her is therefore unnecessary. This, therefore, is a case where the Court has ascertained to its satisfaction that the sum of 135*l*. is in the hands of the defendant Croft as a

(1) [1926] A. C. 155, 170.

constructive trustee, and I can see no reason why the Court should not order payment by the said defendant of that amount into Court: see *London Syndicate* v. *Lord*. (1)

There remains the question of costs. The defendants have severed in their defences but have appeared by the same solicitor. I presume that in the circumstances of the case it matters very little what form of order as to costs is adopted since any costs which I awarded to the defendant Weatherill would have to be set off against the sum recovered from that defendant by the King's Bench judgment, and I gather that the defendant Croft is without means apart from the sum of 135*l*. I will make what I think is the strict order—namely, that the plaintiff do pay the costs of the defendant Weatherill, but that there should be the set-off in question, and that the defendant Croft do pay the costs of plaintiff as against her. The defendant Croft will be ordered to pay the sum of 135*l*. into Court in the usual form, and there will be liberty to apply.

Solicitors for the plaintiff: *Arthur E. Eves & Jones.*
Solicitors for the defendant: *Kinch & Richardson.*

(1) (1878) 8 Ch. D. 84.

K. R. A. H.

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CURTIS MOFFAT, LIMITED *v.* WHEELER.

[1928. C. 4956.]

Vendor and Purchaser—Leaseholds—Covenant not to assign without Licence—Contract for Sale—Licence to assign to Purchaser refused—Licence to assign to Nominee of Purchaser not requested—Return of Deposit—Specific Performance.

On a sale of leaseholds by an original lessee, completion in favour of a solvent nominee of the purchaser can be enforced, unless it is shown that the sale was granted upon considerations purely personal to the purchaser, but the purchaser must join in the assignment for the purpose of guaranteeing the performance of the covenants.

The plaintiff company agreed to purchase from the defendant property of which the defendant was under-lessee. Her under-lease contained a covenant not to assign without the under-lessor's consent, not to be withheld in the case of a responsible assignee. The under-lessor refused a licence to assign to the plaintiff company, but the defendant's solicitors were informed that a licence would be granted to complete in favour of a specified nominee. The licence was in fact available, but the defendant never formally applied for it; and ultimately her solicitors returned the deposit paid by the plaintiff company, who thereupon brought this action for specific performance:—

Held, that the defendant could be compelled to complete in favour of the specified nominee.

Crosbie v. *Tooke* (1833) 1 My. & K. 431 and *Dowell* v. *Dew* (1842) 1 Y. & C. C. C. 345 considered and applied.

Observations on the meaning of the phrase "subject to our solicitors' approval of the title." *Hussey* v. *Horne-Payne* (1878) 8 Ch. D. 670 followed. Dictum of Lord Cairns in H. L. (*Hussey* v. *Horne-Payne* 4 App. Cas. 311) not followed.

WITNESS ACTION.

The following statement of facts is taken from his Lordship's judgment.

At the date of the offer and acceptance next to be mentioned the defendant was entitled to have an under-lease of certain premises known as 69 Three Kings Yard, Davies Street, Mayfair, granted to her by the Savile Club, Ld. The premises form part of the Grosvenor Estate, from whom the Savile Club, Ld., held the property on lease. The under-lease, which had no doubt already been prepared, was actually granted on October 1, 1928. The premises, which are in a mews, are described on the plan as "a motor house, etc., with two stories and rooms over"; the rent is 400*l.* per annum,

and the term twenty-one years from August 11, 1928; and there are, as is usual in leases of this character, a large number of covenants, of which two must be mentioned. The first is a covenant not to assign, transfer, underlet, or part with possession of the premises or any part thereof (otherwise than by will) without the previous consent in writing of the landlord, but so that such consent shall not be withheld to an assignment or underletting of the premises to a respectable and responsible person. The second is a covenant that the demised premises shall not be used for any art, trade, or business whatsoever, but shall be kept and used as a private garage or as two private garages for private motor cars only, and the rooms above the same garage for the lodging of servants or others to be employed in or about the said demised premises, or alternatively as private dwelling-rooms of other persons.

After negotiations on September 27, which resulted in a verbal offer by the plaintiff company's directors of a premium of 850*l.*, the defendant telephoned an acceptance. On the following day the defendant placed before the directors of the plaintiff company a typewritten letter which she had prepared in the following form :—

"To Miss R. Wheeler.

We agree to take 69 Three Kings Yard, Davies Street, W. 1, which we understand has twenty-one years to run at a rental of 400*l.* per annum exclusive of all rates and taxes and to pay a premium of 850*l.*, and we herewith pay you the sum of 85*l.*, being 10 per cent. deposit on the purchase price ; rent to start from September 29, 1928.

We agree to pay you the balance of premium on signing the lease, subject to our solicitors' approval of the title.

Our solicitors are

J. D. Langton & Passmore.

Our references are

Signed per pro Curtis Moffat, Ld.

Curtis Moffat,

Director.

Witness.

Date September 28, 1928."

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Mr. Curtis Moffat, the managing director of the plaintiff company, had added the names of the solicitors, but had left the references blank. He then signed the letter and handed over a cheque for 85*l.*, and the defendant there and then signed a document in the following terms :—

"September 28, 1928.

I hereby acknowledge receipt of cheque for 85*l.* from Curtis Moffat, Ld.

This sum is 10 per cent. deposit on the amount of premium on the lease of 69 Three Kings Yard, which I agree to surrender on payment of the balance of 765*l.*

Rosalind Wheeler."

The solicitors for the defendant, Messrs. Chapman-Walker & Shephard, wrote to Messrs. J. D. Langton & Passmore, the solicitors for the plaintiff, to say that the defendant had handed to them the agreement between herself and the plaintiffs and that the matter was having immediate attention. On the same day Messrs. J. D. Langton & Passmore wrote to Messrs. Chapman-Walker & Shephard stating that they understood that the latter were acting for the defendant, who had agreed to dispose of her lease of 69 Three Kings Yard to the plaintiffs, and that she had been paid a deposit subject to the approval of the lease by themselves.

The defendant by her counsel does not dispute that the documents in question constitute an agreement between the parties for the sale of the leaseholds in question to the plaintiffs, subject to the approval of the title by Messrs. J. D. Langton & Passmore, and that they also constitute a sufficient memorandum to satisfy s. 40 of the Law of Property Act, 1925. It will be observed at once that such a contract was exceedingly likely to lead to difficulties. In the first place there is the question what the phrase "subject to our solicitors' approval of the title" means on its true construction. Independently of this, nothing is said about the covenants above referred to (as to which see *Melzak* v. *Lilienfeld* (1) and the cases there cited), and the agreement was one which could be carried out only with the consent of a third party,

(1) [1926] Ch. 480.

the Savile Club, Ld. Moreover, the agreement was silent on the question whether the defendant was bound to procure the necessary licence, or, if this could not be done, whether the agreement was to be performed in some other way, or whether, on the other hand, the agreement was subject to the landlord's consent to the assignment of the lease, and would not be binding on either party if this consent could not be obtained.

Difficulties naturally arose immediately the copy lease was submitted to Messrs. J. D. Langton & Passmore. On October 16 an application was made on behalf of the defendant for licence to assign the premises to the plaintiffs, and the answer to this was given to the effect that the secretary of the Savile Club, Ld., felt unable to recommend the assignment of the lease to a company which had only recently been formed; but he added that if the lease was to be assigned at all he thought it should be to an individual, e.g., to a Mr. Etchells, one of the directors of the plaintiffs (who had called upon him in regard to the matter), provided that satisfactory references were produced. He added that there had not been a formal meeting of the directors of the Savile Club, Ld., but he was sure that it would be useless to submit the proposal of an assignment to the company, and he therefore suggested the alternative course. It will be seen that the defendant was quite willing that that course should be adopted. Mr. Etchells was also willing, and until December 11 the matter proceeded on the basis that the under-lease would be assigned to a nominee. In the meantime however another difficulty had arisen. The solicitors for the plaintiffs, having considered the form of the lease to the defendant, raised the question of the right of the plaintiffs to use the premises for the purposes of their business, which was that of antique and art dealers; and they said that unless a licence could be given for the use of the premises in such a way the lease would be useless to the plaintiffs. They took up the attitude that the agreement was not binding on their client unless they, as solicitors for the plaintiffs, approved the form of the lease; and on October 8, 1928, they intimated that the

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matter would go on only if their client elected to proceed. Application was made to the Duke of Westminster as ground landlord and to the Savile Club, Ld., as the immediate landlords, for a consent to the proposed user and alterations of the premises for the purposes of a shop. Plans were prepared and submitted in the first instance to the solicitors for the Duke of Westminster. Mr. Etchells' references were meanwhile submitted to the Savile Club, Ld., but no formal or definite application for a licence to assign the premises to Mr. Etchells was made to the Savile Club, Ld., nor had the plans of the proposed alterations been submitted to them till November 20, 1928. There was thus considerable delay, and on December 7, 1928, the solicitors for the defendant wrote the following letter to Messrs. J. D. Langton & Passmore :—

" Dear Sirs,

69 Three Kings Yard.

In view of the refusal of the Savile Club to grant the licence desired by your clients, Curtis Moffat, Ld., and your previous insistence on their behalf that the licence was part of the ' approval of title ' mentioned in the letter of September 28, our client has got no option but to treat the matter as ended. Before, however, making any other arrangements with regard to the property, we write to grant them down to Tuesday evening next to come to a decision whether they are intending to ignore the refusal of the licence and complete the assignment. If the matter is not complete on or before Tuesday next, then, in all the circumstances, our client proposes to refund the deposit of 85*l.* paid, less mesne profits, which will be the proportion of rent from September 29 to the 11th instant.

If we do not hear from you, we shall take the course of sending you a cheque accordingly.

We are,

Yours faithfully,

Chapman-Walker & Shephard."

The refusal of the Savile Club, Ld., referred to in this letter refers to the refusal to accept the company as an assign, and had nothing to do with the application in relation to

Mr. Etchells which was proceeding. Indeed, it was proved before me, though the fact was not known to the parties till after action brought, that the Savile Club, Ld., had approved of Mr. Etchells as an assignee, and the licence to the defendant to assign the premises to him was awaiting only a formal application by the defendant for such a licence. I should add that it was, I think, due to some inadvertence on the part of the defendant that no such formal application had been made; for the defendant produced at the trial a draft in her handwriting of such an application which she appears never to have sent. On December 8, 1928, Messrs. J. D. Langton & Passmore replied to the ultimatum contained in the letter of the preceding day:—

"Dear Sirs,

69 Three Kings Yard.

We are in receipt of your letter of the 7th instant. So far as we are aware, the only notification you have given us is that the Savile Club refuse to give their consent to a company, but that they would be prepared to grant it to a nominee which we are endeavouring to carry out and have approached their solicitors with a view to ascertaining exactly what the Savile Club requires. So soon as we hear from them we shall be in a position to see whether it is possible to give way to the Savile Club's demand.

In regard to your client deducting from the deposit mesne profits to which you refer, this will not satisfy our client if the matter falls through.

Yours faithfully,

J. D. Langton & Passmore."

On December 11, 1928, the secretary of the Savile Club, Ld., in reply to a formal application just made by the solicitors for the defendant for licence to assign to the plaintiff company, replied that this licence would not be given. For some reason which was not explained, for the defendant called no witnesses before me, no request was made in the alternative for a licence to assign to Mr. Etchells, and accordingly the secretary of the Savile Club, Ld., did not state that this licence had already been given and could be forwarded at once on request.

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On Tuesday, December 11, 1928, the day given in the ultimatum, Messrs. J. D. Langton & Passmore, realizing, it seems, that the position was becoming serious, wrote and sent the following letter to Messrs. Chapman-Walker & Shephard on behalf of the defendant :—

"Dear Sirs,

69 Three Kings Yard.

Referring to your letter of the 7th instant, we have now ascertained from the Savile Club's solicitors that they have taken up Mr. Etchells' references, and are awaiting the Savile Club's consent to the same being assigned to him.

We are prepared to complete this matter to-day, handing over the money to you as stakeholders, on an undertaking that your client will take up the licence of the Savile Club in due course to such nominee as we may persuade the Savile Club to accept, and that she will execute an assignment of the lease to such nominee when it has been settled to whom the licence is to be granted.

Yours faithfully,

J. D. Langton & Passmore."

On the same day there was a reply in the following terms :—

"Dear Sirs,

69 Three Kings Yard.

We are in receipt of your letter of to-day's date. We are afraid that our client does not agree to your proposal and, the Savile Club having refused licence to assign to your clients Curtis Moffat, Ld., we must regard the matter as at an end. The deposit paid was 85*l.*, rent, at 400*l.* a year, from December 29 down to date, amounts to 80*l.* We therefore enclose the difference, 5*l.*, as mentioned in our letter of the 7th instant.

Yours faithfully,

Chapman-Walker & Shephard."

The writ claiming specific performance and damages in lieu of or in addition to specific performance was issued a few days later.

W. P. Spens K.C. and *E. M. Winterbotham* for the plaintiffs.

The case of *Day* v. *Singleton* (1) indicates the duties of a vendor where third parties are concerned. In the present case the duty of the vendor is to use every proper means to obtain the landlord's consent to assignment to the purchaser. If she cannot, then the purchaser is entitled to the return of the deposit with interest, and to the costs of investigating title. But if she does not try to obtain the consent, the purchaser is entitled in addition to such damages as he can show he has suffered. This case is not one where there is a clear refusal by the landlord to accept the company as assignee, and then a claim by the company to an assignment as of right. Before completion, a purchaser can put forward a nominee and express a desire that the balance of the purchase money be paid to the nominee. In the correspondence there is a complete agreement that if the landlord is going to make any difficulties about the company as a purchaser, Mr. Etchells shall be substituted. There is no direct decision as to the right of a purchaser of leaseholds to require an assignment to a person other than himself. But none of the text-books indicate that any distinction is drawn between the rights of a purchaser of leaseholds and those of a purchaser of freeholds. The only analogous case is where there has been an agreement to grant a lease which has not been completed before assignment: *Crosbie* v. *Tooke* (2); *Dowell* v. *Dew*. (3) In the case of the granting of a lease, the landlord is bound to grant it in favour of an assignee, unless he can show that it was purely personal. Unless an assignor can show that there is something personal to the person with whom he contracted, he will be bound to assign. But he will, of course, be fully protected in every way. On principle, there ought to be the same right in a purchaser of leaseholds as in a purchaser of freeholds, subject to the fact that in the case of leaseholds it must be clear that the proposed assignee is a reasonably substantial person.

Sir Gerald Hurst K.C. and *E. A. Godson* for the defendant. If there never was a concluded contract, it was legally competent on December 7 for the defendant to break off

(1) [1899] 2 Ch. 320. (2) (1833) 1 My. & K. 431.
(3) (1842) 1 Y. & C. C. C. 345.

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negotiations. So far as the defendant was concerned there was a positive offer to be bound, but the company's offer was conditional. At the date when the defendant purported to break off negotiations, there never had been a contract binding upon the plaintiffs. The defendant was willing to treat herself as contractually bound to assign the lease. But the company's offer was expressly subject to their solicitors' approval of the title, and therefore, if their solicitors had not approved the title by the appropriate date, it was open to the defendant to break off negotiations. The phrase " subject to our solicitors' approval " creates a real condition : see *Hudson* v. *Buck*. (1) That case was criticized in *Hussey* v. *Horne-Payne* (2) by Sir George Jessel M.R. and by Earl Cairns : see also *Von Hatzfeldt-Wildenburg* v. *Alexander*. (3) The ground of that decision was not based on the narrow point of approval of title : see per Parker J., p. 289. That is the only express reference to the narrow isolated condition, " subject to the approval of our solicitors " ; but it is to some extent impinged upon by the obiter dicta of Earl Cairns in *Hussey* v. *Horne-Payne* (2) ; *Day* v. *Singleton* (4) has no application to this case, either on the ground that the defendant has not done her best, or on the ground of nominal damages for investigation of title. The actual contract to assign to the plaintiff company was abandoned by mutual consent. Even assuming that there was a completed contract, the plaintiffs are not entitled to specific performance in favour of a nominee. If the contract is binding, they cannot obtain damages. Assuming that there was a concluded contract, it was no more than a contract to assign to the company. As to damages : see *Day* v. *Singleton*. (4) The cardinal fact distinguishing the present case from *Dowell* v. *Dew* (5) is that the defendant here held the property subject to a restraint, and the only right of the company was to stand in her place and hold the property subject to a restriction against assignment. In *Dowell* v. *Dew* (5) and *Crosbie* v. *Tooke* (6) part

(1) (1877) 7 Ch. D. 683.
(2) (1878) 8 Ch. D. 670 ; (1879) L. R. 4 App. Cas. 311, 321.
(3) [1912] 1 Ch. 284.
(4) [1899] 2 Ch. 320.
(5) (1842) 1 Y. & C. C. C. 345.
(6) 1 My. & K. 431.

of the ratio decidendi was that there was a complete absence of restriction on alienation. An assignee can obtain specific performance of a contract for a lease if there is nothing in the assignor's agreement restraining power to assign. If the right to assign is unrestricted, the right to dispose of the contract is also unrestricted. Assuming the contract to be binding, *Day* v. *Singleton* (1) would govern this case : see also *Buckland* v. *Papillon*. (2) The effect of those cases is that contracts of this sort are treated as assignable if the purchaser's powers to alienate are unrestricted. There is no case where, there being in existence a restriction on the powers of alienation of a person under a contract, an intending lessee is able to assign. To say that a landlord must not unreasonably withhold his consent is to impose a limited restriction. In the present case there is no contract which the Court can find. In such a case, the Court is very loth to determine that there is a sustainable contract when words as indeterminate as these are in it, because the words used make it impossible for the Court to help the parties when disputes arise.

Spens K.C. in reply. On the authorities it is quite clear that a contract between the parties, "subject to approval of title," is good, and that the parties are unequivocally bound. There is no reported case in which a purchaser of leaseholds asks for completion in favour of an assignee. Subject to the purchaser's submitting a proper nominee, and, if necessary, entering into covenants to guarantee, the Court should grant specific performance.

MAUGHAM J. [having stated the facts :] The first defence set up by the defendant is that the contract was expressly made subject to the approval of the title by the purchaser's solicitors and that, such approval not having been given by December 11, the vendor was entitled to treat the contract or negotiations as at an end. This raises a question upon which there is direct authority.

In the case of *Hudson* v. *Buck* (3) it was held by Fry J.

(1) [1899] 2 Ch. 320. (2) (1866) L. R. 1 Eq. 477, 481 ; L. R. 2 Ch. 67.
(3) [1877] 7 Ch. D. 683.

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that if a contract for the purchase of a lease was stated to be made subject to the approval of the title by the purchaser's solicitors, the vendor could not enforce specific performance if the purchaser's solicitor in good faith disapproved of the title. A similar point came before the Court of Appeal in *Hussey* v. *Horne-Payne* (1) on a demurrer, and the Court, consisting of Sir George Jessel M.R., and Cotton and Thesiger L.JJ., agreeing with the views expressed by Fry J. in *Hudson* v. *Buck* (2), decided that the phrase, "subject to the title being approved by our solicitors," did not express merely what the law would otherwise have implied, but was an additional term. It is true that when the case came before the House of Lords (*Hussey* v. *Horne-Payne* (3)) Lord Cairns, then Lord Chancellor, expressed a strong doubt whether the opinion of the Court of Appeal in that respect could be maintained, but the appeal was dismissed on a different ground—namely, that the correspondence as a whole amounted merely to negotiation. It may be observed that Lord Selborne expressed no opinion on the meaning of the phrase in question, and that Lord Cairns did no more than express doubts. In my view I am clearly bound by the decision of the Court of Appeal until it is overruled; and I may perhaps add that it is not altogether surprising to find a great lawyer, once in a way, mistaking the meaning of an uninstructed and perhaps inaccurate layman. Lord Cairns indeed seems to have considered that, if the phrase meant what the Court of Appeal thought it meant, it would follow that the purchaser was at liberty through the medium of his solicitor to decline the title from mere caprice; but none of the judges accepted this extreme view. It is reasonable, they thought, to imply good faith as a necessary ingredient. On the other hand, it seems to be putting an undue strain on the words to construe them, when used by a layman, as connoting not the approval of his own solicitor, which is their plain, ordinary meaning, but the decision of a Court of Justice after an unknown delay and at an unascertainable cost. Nor can I think that there

(1) (1878) 8 Ch. D. 670. (2) (1877) 7 Ch. D. 683.
(3) (1879) L. R. 4 App. Cas. 311.

is anything strange in a purchaser, without legal advice and in complete ignorance and with a natural terror of the niceties of real property law, agreeing to purchase property with a condition that his solicitor, acting reasonably and in good faith, should approve the title. I come then to the conclusion that there would have been no binding contract if Messrs. J. D. Langton & Passmore had refused to approve the title, on the ground that the only document of title—namely, the under-lease—in their opinion contained objectionable restrictions. Having regard, however, to the nature of the agreement, it would seem that they were bound to approve or disapprove within a reasonable time. Accordingly I think that Messrs. Chapman-Walker & Shephard were entitled on December 7, 1928, to require the plaintiffs speedily to determine whether the title was approved. Whether the four days given to Messrs. J. D. Langton & Passmore by the letter of that date were sufficient in the circumstances is a matter on which I need not express an opinion; for before the expiration of that time the latter, by the letter of December 11, expressed their willingness to complete and at once to hand over the money to Messrs. Chapman-Walker & Shephard as stakeholders on the undertaking of the defendant to take up the licence of the landlords in due course to such nominee as the landlords might be persuaded to accept, and to execute an assignment to such nominee. I read this letter as impliedly waiving all objections as to the title, including all objections as to the form of the lease, and as an offer to accept the assignment to any nominee in regard to whom the Savile Club, Ld., would grant a licence. It follows that in my judgment this defence fails, and the contract must be treated as though the title had been approved by the solicitors for the plaintiffs in due time. In coming to this conclusion it must not be forgotten that the defendant was herself in default in not having obtained a licence to assign to the plaintiff company; for, the contract being silent as to the landlord's licence to assign, the defendant, as vendor, was prima facie bound to procure a licence to assign the premises to the plaintiffs at her own expense, and, if she failed to do so before the proper day for completion, would be

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liable in damages, which might include damages for loss of bargain if she had failed to do her best to obtain the requisite licence: *Bain* v. *Fothergill* (1); *Day* v. *Singleton*. (2)

The plaintiffs, however, are seeking specific performance, and here there are some distinctions to be made. If the case is one where the purchaser is seeking specific performance by means of an assignment to himself, I think the position is as follows: If the landlord could properly refuse his consent and had done so, and no other assignee acceptable to the landlord has been suggested, there could be no remedy by specific performance. The landlord however in the present case could not refuse to consent to any proposed assignee, except on reasonable grounds. It may well be that if the landlord had refused his consent to the proposed assignment, on grounds reasonable or unreasonable, there could be no specific performance, owing to the difficulty in which the Court would be placed in enforcing the order, with a possible exception if the grounds alleged were so unreasonable that the lessee might clearly assign to the proposed assignee without consent: *Willmott* v. *London Road Car Co., Ld.* (3); *Lewis & Allenby* (1909), *Ld.* v. *Pegge*. (4) Again, if the landlord's consent in a reasonable case has not been asked for by the defendant vendor, I see no reason why the defendant should not be compelled to ask for it, nor, if granted, why there should not be specific performance.

The defendant, however, has raised a point of a different character. The contract was to assign the leaseholds to the plaintiff company. This, as I hold on the evidence, was impracticable, because the Savile Club, Ld., refused to give their consent; and it is not contended at the Bar that the refusal was unreasonable. The defendant was then, as I have pointed out, liable in damages; but was there any obligation on her, she being an original under-lessee, either to assign the leaseholds to a nominee, however solvent and respectable, or to procure the licence of the landlord for that purpose? She has not expressly agreed to do either of these

(1) (1874) L. R. 7 H. L. 158.
(2) [1899] 2 Ch. 320.
(3) [1910] 2 Ch. 525.
(4) [1914] 1 Ch. 782.

things. On the one hand, it is evident that an assignment to a nominee is not a literal or an exact performance of the contract, and unless other precautions are taken, such an assignment might result in the defendant being exposed on her covenant as an underlessee to a serious liability in the event of the nominee failing to perform the covenants. On the other hand, if the sale had been effected (assuming that course was a possible one) by an assignment to the plaintiffs, they could immediately have compelled the landlords to assent to an assignment to a solvent and respectable nominee against whom no reasonable objection could be urged. There seems to be no authority on the point I am now considering; but there is authority on the analogous question whether a lessor who has entered into a contract to grant a lease to a particular person can be compelled to grant the lease to a solvent nominee, there being no covenant not to assign. The affirmative has in effect been established by the cases of *Crosbie* v. *Tooke* (1) and *Dowell* v. *Dew* (2), with a qualification and a condition, the first, that the contract was not entered into upon considerations personal to the intended lessee, and the second, that the landlord, if he requires it, shall have the benefit of the personal liability of the person with whom he contracted.

In my opinion, treating the matter as one of substance, the principle of these cases should be followed in the case of a sale of leaseholds where, as here, the contract was not entered into upon considerations personal to the purchaser. The restriction on assignment was so qualified that the defendant was always able to compel the Savile Club, Ld., to assent to an assignment to any proper person, and no difficulty has in fact arisen on this head. I hold accordingly that the plaintiffs were entitled, when it was ascertained that the defendant was unable to perform her contract by assigning the lease to the plaintiffs, to call upon her to assign it to a proper nominee; and it may be observed that this view was accepted until December 11, 1928. On the grounds mentioned by the Vice-Chancellor in the case of *Dowell* v. *Dew* (2) I

(1) 1 My. & K. 431. (2) (1842) 1 Y. & C. C. C. 345.

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think that the plaintiffs are bound to offer to join in the assignment to the nominee in question for the purpose of guaranteeing to the defendant the performance by him of the covenants. The Savile Club, Ld., has already expressed its willingness to accept Mr. Etchells as an assignee, and has, indeed, executed a licence to assign to him, and the guarantee by the plaintiffs has been offered by counsel for the plaintiffs. It seems, then, that no difficulty arises in completing the contract.

There must be judgment for specific performance of the contract. The plaintiffs have been out of possession and ought not to be made to pay rent from September 29, 1928. By way of damages the plaintiffs are willing to accept the sum of 150*l.*, which, I think, is reasonable, and judgment will go for that sum.

The defendant must pay the costs of the action, and the counterclaim must be dismissed with costs.

Solicitors for plaintiffs : *J. D. Langton & Passmore.*
Solicitors for defendant : *Chapman-Walker & Shephard.*

K. R. A. H.

STEVENS *v.* HAMPSTEAD BOROUGH COUNCIL.

EVE J.
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April 22, 26.

[1928. S. 3613.]

Contract—Employees of local Authority—Resolution of Borough Council—Enlistment or Calling Up of Employees for naval or military Service—"Full regular pay," less Government Pay and Allowances—Whether inclusive of subsequent Increments of Pay and War Bonuses—Action by ex-service Employee.

In September, 1914, the defendant Council passed a resolution that they would pay to all employees called up or volunteering for service in the war "full regular pay," less Government service pay and separation allowance. The plaintiff, a fitter's mate, employed in the defendants' electricity department, volunteered for service on the faith of that resolution and enlisted in November, 1914, being then in receipt of a weekly wage of 1*l.* 12*s.* 8*d.* The defendants paid to the plaintiff the difference between this sum and his service pay and allowance while he was in the Army. He was discharged from the Army in 1919 and returned to the defendants' service in 1920. By this action he claimed a declaration that he was entitled to certain increments of pay and war bonuses paid during the war to employees in the defendants' service, which he would have received if he had not joined the Army. The Statute of Limitations was not pleaded in defence:—

Held, that the words "full regular pay" in the resolution referred to the regular pay which the employee enlisting was receiving at the date of his enlistment, and excluded any increments of pay or war bonuses subsequently paid to employees in the service of the defendants. The action therefore failed.

Adams v. *Liverpool Corporation* (1927) 137 L. T. 396 followed.

Sutton v. *Attorney-General* (1923) 39 T. L. R. 294 distinguished.

ACTION.

The plaintiff in August, 1914, was employed by the defendants as a fitter's mate, earning 1*l.* 12*s.* 8*d.* per week of fifty-four hours' work, with occasional extra pay for overtime. In September, 1914, the defendant Council passed a resolution that all employees called up or volunteering for service during the war should be paid full regular pay, less any amounts paid by the Government for separation allowance and service pay, and that the positions of all such officers and servants should be kept open until their return to duty without loss of status. The plaintiff enlisted in the Army on November 16, 1914, and served throughout the war,

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being demobilized on July 18, 1919, and rejoining the defendants' service in his former occupation in January, 1920.

The plaintiff brought this action, alleging that he had only received 1*l.* 12*s.* 8*d.* a week, less Government pay and allowances from the defendants, and that he was entitled to all bonuses and increments of pay which he would have received if he remained in the defendants' service instead of joining the Army. The defendants denied liability to pay the plaintiff any more than he had received, and counterclaimed for a declaration that the words "full regular pay" meant the full regular pay of the employee at the date of his enlistment, and did not include any subsequent bonus or increment of pay.

The facts are more fully stated in the judgment. Owing to the action having been delayed by prolonged negotiations between the plaintiff's trade union and the defendants, and its being of a friendly nature, the Statute of Limitations was by agreement not pleaded.

Norman Daynes for the plaintiff. The expression "full regular pay" is in effect the same as the "full civil pay" found in *Sutton* v. *Attorney-General* (1), which a majority of the House of Lords held included increments of pay and war bonuses. The word "regular" does not confine the pay to the existing rate, but refers to the rate of pay fixed by regulation for the time being ordinarily receivable by a man in the same grade or class as the plaintiff. The increments in rates of pay and war bonuses were given mainly to meet the depreciation in the value of money caused by the war. The separation allowance made by the Government was also increased from time to time, but it is not suggested that it ought not still to be deducted. The defendants, however, said that they would not take any notice of an increase in the separation allowance. "Regular" pay excludes payment for overtime, and extra or gratuitous earnings: *Railway Clearing House* v. *Druce* (2); *Aylott* v. *West Ham Corporation.* (3)

(1) 39 T. L. R. 294. (2) [1926] W. N. 209; 42 T. L. R. 663.
(3) [1927] 1 Ch. 30.

B. L. A. O'Malley for the defendants. The authorities on this question do not decide any principle; each case depends on the words used in the resolution or contract entered into with the employee. The decision in *Aylott* v. *West Ham Corporation* (1) was before that in *Railway Clearing House* v. *Druce*. (2) The present case, it is submitted, is indistinguishable from that of *Adams* v. *Liverpool Corporation* (3), where the Court of Appeal, affirming the decision of Branson J., held that a resolution to pay such a sum as with Government pay and allowances would make up "full salary or wages" to the officer or employee serving, meant the full salary or wages he was then receiving under his contract with the Corporation, and did not include subsequent increments of salary and war bonuses. The expression "full civil pay" in *Sutton's* case (4) involves an element of futurity which is absent here. There is no reference whatever to any future rights.

Romer J., who was the judge of first instance in *Aylott* v. *West Ham Corporation* (1), was a member of the Court of Appeal which gave the unanimous decision in *Adams* v. *Liverpool Corporation* (3) on which I rely.

Cur. adv. vult.

April 26. EVE J. At the outbreak of the war in August, 1914, the plaintiff was in the employ of the defendant Council as a fitter's mate in the Electricity Department. His wages were 7¼*d.* per hour for a week of fifty-four hours, and his employment was determinable by an hour's notice on either side. He occasionally earned extra pay by working overtime.

In September, 1914, the Council adopted the recommendations of their Finance Committee that all employees of the Council called up for naval or military service or who have volunteered or may volunteer for such service during the continuance of the war be paid full regular pay less the amounts paid by the Government for separation allowance and pay, and that the positions of all such officers and servants be kept open until their return to duty without loss of status.

(1) [1927] 1 Ch. 30.
(2) [1926] W. N. 209; 42 T. L. R. 663.
(3) 137 L. T. 396.
(4) 39 T. L. R. 294.

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The plaintiff in reliance upon the resolution, and accepting the offer thereby made, volunteered for military service, and was enlisted on November 16, 1914. He served for 4 years and 245 days with the colours, and was discharged on July 18, 1919, as no longer physically fit for war service owing to wounds. His incapacity continued down to January 26, 1920, when he returned to duty with the Council by whom he has been employed ever since, first as a fitter's mate and subsequently as a fitter. From November 16, 1914, down to January 26, 1920, the Council paid to the plaintiff weekly sums of 1*l.* 12*s.* 8*d.*, being the equivalent of wages at 7¼*d.* an hour for fifty-four hours, less the amounts paid by the Government for separation allowance and pay. In the course of the period between November 16, 1914, and January 26, 1920, several increases of pay were awarded as the result of compulsory arbitrations between the Council and the trade union to the men employed in the Electricity Department, including fitters and fitters' mates, and the plaintiff has brought this action claiming a declaration that upon the true construction of the resolution of September, 1914, the expression "full regular pay" includes all war bonuses and increments of pay, and that he is entitled to such of the bonuses and increments as he would have received had he continued in his employment with the Council instead of enlisting in the army.

The defendants do not accept the plaintiff's view, and counterclaim that the words mean the full regular pay at the date of enlistment, and do not include any war bonuses or increments of pay paid after that date to fitters or fitters' mates in their employ.

I think this case is entirely covered by the decision in *Adams* v. *Liverpool Corporation* (1), and the reasoning by which it is supported. It is conceded that a new contract was entered into between the plaintiff and the defendants when the plaintiff enlisted, and that the terms of that contract are to be found in the resolution. What did the Council thereby agree to pay to the enlisting employee? "Full regular

(1) 137 L. T. 396.

pay." Whose full regular pay? Not that of the workman who would thereafter be doing the work theretofore done by the enlisting workman, but the full regular pay of the enlisting workman—the regular pay he was receiving for his labour down to the time when his contract of employment as a workman was superseded by this new contract. And what was the plaintiff's regular pay? $7\frac{1}{4}d.$ per hour for a week of fifty-four hours. The difference between that sum and the moneys he was to receive from the Government as separation allowance and pay was all that the Council, in my opinion, contracted to pay him. The contract in this case is quite different in its terms from that in the case of *Sutton* v. *Attorney-General* (1), where the words "full civil pay" were held, as they were also in *Aylott* v. *West Ham Corporation* (2), to mean "full civil pay with all its ordinary inherent privileges and advantages, including increments granted according to the practice followed in reference to those receiving full civil pay." In the case of the *Railway Clearing House* v. *Druce* (3) the words used were "salary or standard rate of pay," and the House of Lords, distinguishing this expression from the "full civil pay" in *Sutton's* case (1), and holding that it referred to the salary or pay of which the man was in receipt when his employment determined, negatived his right to be paid the war bonuses subsequently paid to the employees who did not join the forces. The same reasoning was applied in the *Adams* case. (4) There the contract on the part of the Corporation was to pay the enlisting officer or servant such a sum as with the pay and allowances received from the Government would make up his full salary or wages. Branson J. and the Court of Appeal held that the expression "full salary or wages" meant the full salary or wages which an officer or servant was receiving when he left his work with the Corporation and enlisted, and did not include war bonuses paid to officers and servants who remained at their work and did not enlist. In my opinion it is impossible to distinguish that case from the present one.

(1) 39 T. L. R. 294.
(2) [1927] 1 Ch. 30.
(3) [1926] W. N. 209; 42 T. L. R. 663.
(4) 137 L. T. 396.

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The contract here was to pay the plaintiff the difference between his full regular wage at the date when he left the employment of the Council, 1*l.* 12*s.* 8*d.* per week, and the sums he received from the Government and nothing more. The action, therefore, fails, and must be dismissed with costs. If the defendants desire it, they may take a declaration, as asked by the counterclaim, and the plaintiff must pay the costs of the counterclaim.

Solicitors: *W. H. Thompson; Arthur P. Johnson.*

H. L. L.

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[1928. E. 832.]

Civil Service—Royal Irish Constabulary—Disbandment—Compensation payable by Treasury to retiring Officers and Men—Annual Allowance—Based on Salary and Pay—"Calculated in like manner to the pension which the officer or constable would have been entitled to"—Exclusion of special Allowances from Computation—Constabulary (Ireland) Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 55), *s.* 1, *Schedule, Part I., Rules.*

The Royal Irish Constabulary, which was established by statute in 1836, and had since been regulated by various Acts and Orders, was disbanded, in consequence of the Treaty creating the Irish Free State, by the Constabulary (Ireland) Act, 1922, under which every retiring officer and constable became entitled to receive such compensation as might be awarded to him by the Treasury in accordance with the Rules contained in the Schedule to the Act.

Under these Rules the compensation was to be an annual allowance to be calculated in like manner as the pension which the officer or constable would have been entitled to, if he had retired from length of service and had qualified for a pension under the existing enactments, but with the addition of ten or twelve years' hypothetical service, according to circumstances, as the case might be. The latest existing enactment in force was the Constabulary and Police (Ireland) Act, 1919, under which the Lord-Lieutenant was empowered to make Orders dealing with the pay, allowances, and pensions of the force, and such Orders were made in March, 1922, superseding all previous statutory provisions dealing with the same subjects.

An action was brought by former members of the force, who had been disbanded, and the dependants of a former member who had died since the date of disbandment, claiming that the Treasury in making payments of compensation under the Act had omitted to include in the salary or

pay of the disbanded officers and men, which was to be taken as the basis of compensation, certain allowances being made to them at the date of disbandment for housing, rent, service and other expenses in accordance with the Allowances Order, 1922, and that such allowances ought to be taken into account, and further that the infant plaintiffs, children of the deceased constable, had received no gratuity or allowance:—

Held, that the Rules under the Act must be interpreted by reference to the above mentioned Orders, and that having regard to them and particularly to cl. 16 of the Allowances Order, which provided that none of the allowances specified therein should be taken into account for the purpose of computing the pension or gratuity of any member of the force or that of any wife, child, or dependant of any such member, the Treasury was right in not taking into consideration any of such allowances in calculating the compensation payable.

Held, further, that as the deceased member of the force, the father of the infant plaintiffs, had died more than twelve months after the date of disbandment, his infant children would not have been entitled to any gratuity under the Pensions Order, 1922, if he had died after retiring from length of service, and were therefore not entitled to any gratuity or compensation under the Act of 1922 and the Rules thereunder.

ACTION.

The first three plaintiffs Egan, Justice and McCarthy were two former officers and a former constable in the Royal Irish Constabulary, and the remaining plaintiffs were the widow, Helena Shea, and the infant children of Percy Shea, a former constable of the Constabulary who died in 1925. The Constabulary were disbanded by the Constabulary (Ireland) Act, 1922 (12 & 13 Geo. 5, c. 55), subject to the payment of compensation to retiring officers and men, in accordance with the Rules in the Schedule to the Act, and the plaintiffs claimed that in calculating the compensation paid to them the Treasury had omitted to include in the salary or pay which formed the basis of that compensation certain allowances which at the date of disbandment were being made to the officers and men in addition to their salary. The allowances so payable are set out in the Schedule to the Allowances Order hereinafter referred to. The Treasury contended that the compensation payable had been duly calculated in accordance with the Rules, which, properly interpreted, excluded such allowances from consideration.

The facts and the material sections of the various Acts,

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and of the Rules and Orders made thereunder, are fully stated in the judgment of the learned judge.

A. A. Dickie (K.C. Ireland) and *Hector Hughes* (K.C. Ireland) for the plaintiffs. The Treasury has refused, in calculating the compensation payable, to take into consideration any emoluments save actual pay. The compensation is to be an annual allowance based on the officer's or constable's salary, and the word "salary" in previous Acts dealing with the Constabulary has a special meaning. It must include all allowances for housing, lodging, servant, etc., as enumerated in the Allowances Order, 1922: see the Constabulary (Ireland) Act, 1874 (37 & 38 Vict. c. 80, s. 3).

Salary is what a workman or constable is entitled to get under his contract of service.

Under the Workmen's Compensation Acts "earnings" have been held to include gratuities and allowances. Here the word "salary" must be construed in the same sense as in previous Acts governing the Constabulary.

Under s. 74 of the Government of Ireland Act, 1920, the expression "salary" was to include "remuneration, allowances and emoluments." That Act was to come into force upon a day to be fixed by Order in Council, but the Order was never made, and the Act was abortive. As regards the Constabulary its provisions were replaced by those of the Constabulary (Ireland) Act, 1922. The emoluments of an officer or constable are described as "salary" in that Act and in the Rules made thereunder, and therefore salary must include all allowances.

Under r. 2 the annual allowance is to be calculated "in like manner" as the pension the officer or constable would have been entitled to if he had retired. "In like manner" only refers to the method of calculation of length of service, as qualified by the Rules.

The infant plaintiffs have received no gratuities under the Act, and the reason given by the Treasury is that their father, Percy Shea, died more than twelve months after the date of disbandment. But there is nothing in the Act, or

in the Rules made under it, to suggest that the children of a deceased officer are to be deprived of their gratuities for that reason.

[They referred to *Reg.* v. *Postmaster-General* (1); *Railway Clearing House* v. *Druce* (2); *Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue* (3); *Goldsmiths' Co.* v. *Wyatt* (4); *Ex parte Brindley* (5); *Ex parte Copeland* (6); *Wigg & Another* v. *Attorney-General for Irish Free State* (7); *Hollinshead* v. *Hazleton.* (8)]

Sir Thomas Inskip A.-G., Sir F. Boyd Merriman S.-G., Giveen and *Stafford Crossman* for the defendant. The question depends entirely on the construction of the Constabulary (Ireland) Act, 1922, and the Rules thereunder, and the previous Acts are only of historic interest. These Acts were passed mainly to advance the rates of remuneration, on which pensionable rights were based. The various statutes use the words "salary" and "pay" indifferently, and no distinction can be drawn between them. In s. 2 of the Constabulary and Police (Ireland) Act, 1883 (46 Vict. c. 14), "the pay of constables" is dealt with, while the marginal note is "Revised salaries for men of the Royal Irish Constabulary."

Under s. 1 of the Act of 1922 every retiring officer and constable shall be entitled to receive "such compensation as may be awarded to him by the Treasury in accordance with the Rules contained in the Schedule." By r. 1 the compensation is to be an annual allowance, and by r. 2 it is to be calculated in like manner to the pension which the officer or constable would have been entitled to receive if he had retired from length of service under the existing enactments applicable. That refers back to the Orders made by the Lord-Lieutenant of Ireland under the powers of the Constabulary and Police (Ireland) Act, 1919, and the methods of calculation and principle found in the Pensions

(1) (1876) 1 Q. B. D. 658.
(2) (1926) 135 L. T. 417.
(3) [1896] 1 Q. B. 222.
(4) [1907] 1 K. B. 95.
(5) (1887) 4 Mor. 104.
(6) (1852) 2 De G. M. & G. 914, 920.
(7) [1927] A. C. 674.
(8) [1916] 1 A. C. 428.

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Order of March 16, 1922, subject to the modifications contained in paras. (*a*), (*b*), (*c*), and (*d*) of the Rules. Rule 5 refers directly to the Orders of 1922.

There is no mention of any special allowances at all in the Act of 1922 or in the Rules. And by the R.I.C. Allowances Order of March 13, 1920, it is expressly provided by cl. 16 that none of the allowances specified in the Schedule shall be taken into account for the purpose of computing the pension or gratuity of any member of the force, or the pension, gratuity or allowance of the wife, child or dependant of any member of the force.

It cannot be said that "salary" includes allowances while "pay" does not. The meaning of the word "salary" depends entirely on the context: *Goldie* v. *Torthorwald School Board.* (1) In *Railway Clearing House* v. *Druce* (2) Lord Dunedin expressed the opinion that salary was a less wide word than pay.

It is only by special enactment, as in the Act of 1874, that "salary" includes any particular allowances, and the inference must be that as a general rule it does not include allowances: *Upperton* v. *Ridley.* (3)

The two Acts of 1920 and 1922 are not in pari materia, and their intentions and objects are entirely different.

As to the claim by Mrs. Shea and the infant plaintiffs, her children, she has been given a larger pension than she is strictly entitled to. Under r. 4 the pension or gratuities to be given to the widow and children are to be granted in like manner as if the allowance were a pension granted on retirement. That involves a reference back to the Pensions Order, 1922, r. 6, by which the children under sixteen years of age of a member of the force are entitled to allowances if their father dies while a member of the force or within twelve months of the grant of a pension, or at any time from the effects of an injury received in the execution of his duty without his own default. Here Percy Shea died more than twelve months after the date of disbandment and not from

(1) (1895) 33 Sc. L. R. 197. (2) (1926) 135 L. T. 417.
(3) [1903] A. C. 281.

the effects of any injury received in the execution of his duty. The children therefore of Mrs. Shea are not entitled to any allowance under the Act of 1922 or the Rules, as r. 4 depends entirely on the language of the Pensions Order.

The compensation payable in each case has been properly calculated by the Treasury and the action ought to be dismissed.

Dickie K.C. replied.

Cur. adv. vult.

May 6. EVE J. The Royal Irish Constabulary was established in the year 1836; in August, 1922, it was disbanded pursuant to the Constabulary (Ireland) Act, 1922 (12 & 13 Geo. 5, c. 55), and thereupon, under s. 1 of the Act, every retiring officer and constable of the force became entitled to receive such compensation as might be awarded to him by the Treasury in accordance with the Rules contained in Part I. of the Schedule to the Act, and in the event of his dying after a compensation allowance had been awarded to him, the Treasury was to grant a pension or gratuities to his widow and children, in accordance with the said Rules. The three plaintiffs Egan, Justice and McCarthy and one Percy Shea, the husband of the plaintiff Helena Shea, were respectively a county inspector, a sergeant and constables who retired on the disbandment of the force. The infant plaintiffs are children of the late Percy Shea and the plaintiff Helena Shea.

By r. 1 in Part I. of the Schedule to the Act it was enacted that the compensation which might be awarded to an officer or constable should be an annual allowance, and in due course the Treasury awarded annual allowances by way of compensation to each of the three first named plaintiffs and Percy Shea. The last named died in 1925, and thereupon a pension of 30*l.* a year was awarded by the Treasury to his widow, the plaintiff Helena Shea.

The plaintiffs do not dispute the sufficiency of the allowances so granted if the construction put upon the Act and Rules by the Treasury be correct, but their case is that this construction is wrong, in that in making the calculations

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thereunder the Treasury has omitted to include therein certain allowances which at the time of the disbandment were being made to officers and some constables in addition to their wages or pay. The dispute, therefore, falls to be determined on the construction of the Act and Rules.

It is to be noted in primis that the compensation to be awarded is an allowance to be fixed according to the Rules. It is not a case wherein it is left to the Treasury to determine at its discretion a fair compensation for loss of the employment, and to award accordingly; its function is to award such a sum as is ascertained by applying the Rules to each particular case; that is to say, by making the calculations of ascertained facts and adding thereto certain hypothetical facts therein respectively mentioned. These are to be found in r. 2, which provides that the allowance is to be calculated in like manner as the pension which the officer or constable would have been entitled to receive if he had retired from length of service under the existing enactments applicable to him, and had been qualified in respect of his length of service for a pension, and there we must, I think, interpolate the words "would have been calculated," save that for the purposes of the calculation there should be added to his completed years of actual service ten years if the proportion of salary on which his allowance was calculated was one-fiftieth, and twelve years if the proportion was one-sixtieth, and further, that his salary should be taken at the amount which it would have reached if he had continued to serve in the same rank for the number of years so added, and in the case of district inspectors of the second and third classes respectively, as if they were entitled to the several promotions therein mentioned. The successive stages, therefore, were first to ascertain the individual's actual length of service, secondly to add thereto ten or twelve years, as the case might be, thirdly to determine what his salary would have amounted to at the end of the hypothetical extended period of service, and finally to ascertain the pension he would have been entitled to receive under existing enactments for such extended period of service.

The plaintiffs raise no objection to the procedure adopted. Their complaint is that in determining what the salary would have amounted to at the end of the extended period of service the amount has been fixed on wages or pay only, and has not included anything for allowances. Their main argument is founded on the use of the words "compensation" and "salary." The former, it is argued, is a word of wide significance, and in a case like this must be read as equivalent to "amends for loss sustained," and a grant based on a calculation from which a material item of loss is eliminated cannot properly be described as "compensation." As regards "salary," the argument proceeds on the lines that this word has throughout the legislation dealing with the Irish Constabulary acquired a particular meaning, and has been therein always used to denote pay and allowances. The allowances of which the first three plaintiffs and Shea were in receipt at the date of the disbandment are shown in the particulars delivered by the Treasury Solicitor on October 30, 1928. Some of these it will be seen are of a temporary character, and would appear to create a difficulty in ascertaining the amount to be taken as the salary at the end of the hypothetically increased service, but the plaintiffs surmount this apparent difficulty by claiming that all the allowances of which the officer or constable was in actual receipt at the date of the disbandment must be treated as included in the calculation to be made for ascertaining the future salary; in other words, the future salary will be fixed on the footing that all existing allowances would have continued down to the hypothetical date.

In support of the argument that the word "salary" in Part I. of the Schedule to the Act of 1922 must be read as including "remuneration allowances and emoluments" (see para. 14 of the statement of claim) attention was directed to the several Acts referred to in the pleadings, and it will be perhaps as well that I should deal with them before stating the conclusion I have arrived at as to the meaning of the word in the relevant Act.

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By the Act of 1874 (37 & 38 Vict. c. 80) the Lord-Lieutenant was empowered (s. 2) to fix the revised annual salaries payable to the various ranks of the force therein mentioned, and (s. 3) to grant superannuation and gratuities, but nothing therein contained was to entitle any member of the Constabulary Force absolutely to any superannuation allowance, and in calculating any superannuation the term "salary" was to include "all allowances for lodging house-rent and servant," and (s. 8) to order and direct that 2*s.* per week should be paid by way of special allowance to head and other constables while serving in Belfast or Londonderry, with a view to meeting the extra expense to which the men serving therein respectively were subject. The Act extends to all ranks of the force. A salary is fixed for each rank, and the word "pay" is not used. The special provision at the end of s. 3 that for superannuation calculations the term "salary" is to include all allowances for lodging houserent and servant raises a presumption that but for the provision it would not have done so, and leaves it doubtful whether the allowance of 2*s.* per week under s. 8 could properly be taken into account.

By the Act of 1882 (45 & 46 Vict. c. 63) the Lord-Lieutenant is authorized (s. 2) "to fix the annual salaries to be paid to the several County Inspectors and Sub Inspectors of Constabulary at rates not exceeding those specified in the Schedule to this Act"; the third section of the Act of 1874 is amended (s. 3), and it is enacted that for the purpose of calculating the amount of any pension granted under the Act the term "salary" shall include all allowances for lodging houserent and servant. The Schedule to the Act is headed "Rates of Pay."

The criticism I have already made on the earlier Act is applicable to this one, and a comparison of the language of s. 2 with the Schedule seems to show that the words "salary" and "pay" were therein respectively each employed to denote the same subject-matter.

The next Act was passed in August, 1883 (46 Vict. c. 14). By s. 2 so much of the Act of 1874 as limits the annual salaries

of the Head Constable Major, the Head Constables, Constables, Acting Constables and Sub Constables to the sums specified in that Act, is repealed, and it is enacted that "The pay of Constables of the Royal Irish Constabulary" shall be according to the rates specified in the Schedule thereto. Sect. 3 provides that subject to the provisions of the Act every constable who became a member of the force on or after August 10, 1866, or who should become a member thereof after the passing of the Act, should, subject to certain provisions and conditions to which I need not refer in detail, be entitled to retire and receive a life pension on the scale set out in the Second Schedule. In Sch. I., headed "Rates of Pay of Royal Irish Constabulary" the scheduled rates of pay are referred to as weekly pay, and in Sch. II. the scale of pensions is fixed according to length of service at an annual sum equal to a fraction of the annual pay for every completed year of service. The concluding paragraph of Sch. II., so far as it relates to the Royal Irish Constabulary, is in these words: "The annual pay with reference to which pensions and allowances under this Act shall be calculated is the pay set out in the First Schedule to this Act."

It is in this Act that the remuneration to constables ceases to be referred to as "salary" and becomes "pay," but even if it be the fact that from this time forward a distinction is to be found between the salary of the officer and the pay of the constable, it is impossible to overlook the fact that down to this point the Legislature appears to have thought it advisable to state specifically in two Acts that for superannuation allowances and pensions thereunder the word "salary" was to include the allowances for lodging houserent and servant, and in the third that the weekly pay alone was to be the basis of the calculation.

By an Act of 1908 (8 Edw. 7, c. 60) increased rates of pay for head and other constables were substituted for those scheduled to the Act of 1883, and it was provided by s. 6 that any pension, pension allowance or gratuity granted after the passing of the Act to a constable or the widow and

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children of a constable should be calculated with reference to the scale of such increased rates.

By the Constabulary and Police (Ireland) Act, 1914 (4 & 5 Geo. 5, c. 54), the First Schedule to the Act of 1883, and ss. 1 and 6 and the Schedule to the Act of 1908 were repealed (see s. 3, sub-s. 3, and s. 7 and the Fourth Schedule); and by s. 1, sub-s. 1, it was enacted that the pay of district inspectors of the Royal Irish Constabulary should be according to the rates specified in Part I. of the First Schedule instead of the rates fixed in pursuance of the Act of 1882, and by sub-s. 2, that the pay of constables should be according to the rates specified in Part II. of the First Schedule instead of the rates specified in the Act of 1883, as amended by the Act of 1908. Although in this section the remuneration of both officers and constables is referred to as "pay," and the Schedule is headed "Rates of Pay of District Inspectors and Constables," the last column in Part I. is headed "Yearly salary," and in Part II. "Weekly Pay." By sub-s. 2 of s. 3 of this Act it is provided that for the purpose of calculating any pension allowance or gratuity granted to a constable or the widow and children of a constable the Second Schedule to the Act of 1883 is to have effect subject to this modification, that the reference in the Second Schedule to the pay set out in the First Schedule to that Act shall be construed as a reference to the pay set out in Part II. of the First Schedule to this Act; that is to say, the pensions were thereafter to be calculated on the increased rates of pay provided under this Act.

By a later Act passed in 1916 (6 & 7 Geo. 5, c. 59) increased rates of pay for district inspectors and constables were substituted for those provided by the Act of 1914, and in the application of sub-s. 2 of s. 3 of that Act to any pension allowance or gratuity any reference to any Schedule to the Act of 1914 was to be construed as a reference to the corresponding Schedule of the Act of 1916. In the Schedule to this last mentioned Act the payments to the district inspectors and constables are referred to respectively as "Yearly Pay" and "Weekly Pay," and there is no mention of the word "salary."

In 1918 a further Act was passed (8 & 9 Geo. 5, c. 53) increasing the pay of county inspectors, district inspectors and constables as therein mentioned, and embodying a like provision to that contained in the Act of 1916 regarding the application of sub-s. 2 of s. 3 of the Act of 1914 to the Schedules of the Act of 1918. In this Act and the Schedules the word "pay" is used throughout, except that in the first paragraph of Part I. of the First Schedule occurs this sentence: "In the case of any County Inspector appointed to that rank before the 1st September, 1918, his yearly salary as from that date shall be calculated as if this Schedule had been in operation at the time of his appointment."

By s. 4 of the Constabulary and Police (Ireland) Act, 1919 (9 & 10 Geo. 5, c. 5), the Lord-Lieutenant was empowered to make Orders as to the pay, pensions and allowances of members of the Royal Irish Constabulary, and by any such Orders to prescribe rates and scales of pay, pensions and allowances (including conditions applicable thereto) as respects all the members of the force, and as respects any rank, class or grade in the force, and, subject to the provisions of the Order any rates, scales and conditions thereby prescribed were to have effect as from the date therein specified in substitution for the rates, scales and conditions in force immediately before the making of the Order, whether such last mentioned rates, scales or conditions were prescribed by statute or any previous Order under that section, or otherwise.

By an Order dated May 12, 1920, made in exercise of the powers so conferred, it was ordered that the pay of the members of the Royal Irish Constabulary of the several ranks, classes and grades mentioned in the Schedule thereto should, as from April 1, 1919, be in accordance with the rates, scales and conditions prescribed in that Schedule. The Schedule included officers and men of all ranks.

By another Order dated May 13, 1920, made in exercise of the same powers, it was ordered that as from October 1, 1919, the allowances payable from police funds of members of the Royal Irish Constabulary of the several ranks, lasses

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and grades mentioned in the Schedule thereto should be in accordance with the rates, scales and conditions specified in that Schedule, and that as from the said October 1, 1919, the allowances theretofore so payable of members of the several ranks, classes and grades so mentioned should cease. The Schedule included county and district inspectors, head constables, sergeants and constables, and by cl. 16 provided that none of the allowances specified in that Schedule should be taken into account for the purpose of computing the pension or gratuity of any member of the force, or the pension, gratuity or allowance of the wife, child or dependant of any member of the force.

By a third Order dated May 15, 1920, made in exercise of the same powers, it was ordered that the pensions and gratuities to be granted on retirement to members of the Royal Irish Constabulary of the several ranks, classes and grades indicated in the Schedule thereto and the pensions, gratuities and allowances of the widows and children of such members should be in accordance with the rates, scales and conditions prescribed in that Schedule.

In December of the same year, 1920, the Act to provide for the better government of Ireland was passed (10 & 11 Geo. 5, c. 5), but before passing to consider its provisions it will be useful to review the position now reached. Reviewing the catena of statutes and Orders for the period commencing with the Act of 1874, and ending with these three Orders of May, 1920, can it be said that they disclose a use of the word "salary" adequate to establish the plaintiffs' contention that it had acquired a meaning more nearly equivalent to that of the word "emoluments" than to that of "remuneration," "pay" or "wages"? I do not think it can. I have already criticized the three earlier Acts, in the third of which—that of 1883—the word "pay" was substituted for "salary" in the case of constables.

Subsequent to that date, I think the words "pay" and "salary" if not used interchangeably, as for example they certainly appear to be in s. 1, sub-s. 1, of the Act of 1914—in s. 1, sub-s. 1, and Part I. of the Schedule to the Act of

1916, and in s. 1, sub-s. 1, and Part I. of the Schedule to the Act of 1918—were used to denote respectively remuneration fixed by statute paid weekly and that paid at longer intervals.

From this it follows that in my opinion the three Orders of May, 1920, fixed the remuneration of all ranks, and the allowances and rates of pension, and that cl. 16 of the Allowance Order applied equally to remuneration paid as salary and to that disbursed as pay.

Turning now to the Act of 1920, by s. 9 the management and control of the Royal Irish Constabulary, and the administration of the Acts relating thereto, were to be reserved matters until such date not being later than the expiration of three years after the "appointed day" as His Majesty in Council might determine, and on the date so determined the public services in connection with the administration of these Acts, and the management and control of the force was to be transferred from the Government of the United Kingdom to the Government of Southern Ireland as respects Southern Ireland, and to the Government of Northern Ireland as respects Northern Ireland. By the joint operation of s. 59 and s. 60, sub-s. 8, officers and constables of the Royal Irish Constabulary who at the appointed day should be concerned solely in Southern Ireland were to become officers and constables of the Government of Southern Ireland, and those who should be concerned solely in Northern Ireland were to become officers and constables in Northern Ireland. By sub-ss. 1, 2, 4 and 7 of s. 60, all officers and constables serving at the day of transfer were after that day to continue to serve on the same terms and conditions as theretofore, and while so serving should not receive less salaries than they would have received if that Act had not passed; any existing enactments relating to their pay or pensions were after the transfer to continue to apply as respects any officer or constable serving at the date of transfer, the provisions as to compensation contained in the Tenth Schedule to the Act were to apply with respect to the officers and constables serving at the day of transfer, and in that section and in the Schedule the

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expression "day of transfer" meant the day on which the control and management of the force were transferred from the Government of the United Kingdom. By the definition section, s. 74, unless the context otherwise requires, the expression "salary" includes remuneration, allowances and emoluments.

By the Tenth Schedule it was provided that any officer or constable who after the day of transfer should retire voluntarily under the conditions therein contained, or be removed or required to retire for any cause other than misconduct, should, unless qualified for the maximum pension that could be granted to him for length of service, only be entitled on retirement to receive such compensation as might be awarded to him by the Lord-Lieutenant in accordance with the Rules contained in that Schedule. The first two Rules, which are the important ones, are substantially the same as those contained in Sch. I. to the Act of 1922. The enactment that the annual allowance awarded to an officer or constable as compensation is to be calculated in like manner as the pension which the officer or constable would have been entitled to receive would have been calculated if, etc., involves the inquiry how such pension under the then existing enactments applicable to him would have been calculated. For this information reference must be had to the Orders of May, 1920, including the Allowances Order containing cl. 16 which provides that none of the allowances specified in the Schedule thereto are to be taken into account for the purposes of computing the pension of any member of the force. Under the Rules, therefore, the calculation has to be made without taking allowances into account, and this context appears to me to require a more restricted meaning to be assigned to the word "salary" in r. 2, sub-ss. (*a*) and (*b*), than the one it would bear if there were no such context. Effect can only be given to the opening words of r. 2 by treating the word "salary" as equivalent to the words "pensionable salary," or in other words, the salary which would be the basis on which the pension would be calculated.

The Act of 1920 never in fact came into force; it proved abortive; and in March, 1922, shortly before the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), was passed, a further Order dated March 16, 1922, was made in exercise of the powers conferred by s. 4 of the Act of 1919, whereby it was ordered that as from August 28, 1921, the pensions payable thereunder should be in accordance with the scales and provisions contained in the First Schedule thereto, the scale fixed for ordinary pensions being one-sixtieth of the annual pay for every completed year of approved service, and in calculating any pension for the purposes of that Order "annual pay" meant annual pay at the date of death or retirement, as the case might require.

With this Order concludes the examination of the various Acts and Orders referred to in the statement of claim, and in the course of the argument.

The contention on the part of the plaintiffs is that regarding them as a series of Acts and Orders having statutory effect dealing with the same subject-matter they ought all to be read and construed as being in pari materia, and that so construed they have imposed on the word "salary" a wider meaning than the meaning attached to such words as "pay," "annual pay" and "wages," and that it has come to mean "pay and allowances." Assuming that the statutes and Orders ought to be regarded in pari materia, for reasons expressed in the course of this judgment I do not feel able to adopt the view contended for as to the construction of the word "salary" in the Acts prior to the Orders of May, 1920. There appear to me to be good grounds for saying that when the word was intended to include anything beyond the regular pay, an extended meaning is expressly attached to it, and that in the absence of such express extension it is used in the same sense as the word "pay," and the expression "annual pay."

After the Orders of May, 1920, and in particular the Allowances Order with its express provision that none of the allowances are to be taken into account for the purpose of computing the pension, I think it is impossible to hold that

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a statutory rule which begins by directing that the compensation allowance is to be calculated in like manner as the pension will bend to a construction which in effect would result in the calculation being made not only in a manner different from but actually contrary to that laid down for calculating the pension. I think the word "salary" has been rightly construed under the Act of 1922 as being equivalent to pay or annual pay.

This conclusion admittedly disposes of the claims of the four adult plaintiffs.

The answer to that of the infants is this. Rule 4 in Part I. of the Schedule to the Act of 1922 provides that "in the event of an Officer or constable dying after an annual allowance has been awarded to him under this Act the Treasury shall grant a pension or gratuities to his widow or children in like manner as if the allowance were a pension granted on retirement, and as if his years of service had been the years on which the allowance was calculated."

This Rule involves a reference to cl. 6 of the Order of March 16, 1922, by which it is ordered that "where a member of the force having been granted a pension dies within twelve months after the grant of the pension or at any time from the effects of an injury received in the execution of his duty without his own default his children under 16 years of age shall be entitled to allowances until they severally reach the age of 16 years."

As Shea did not die from the effects of an injury received in the execution of his duty, or within twelve months after the allowance had been awarded to him, the infant plaintiffs cannot successfully claim the allowances under cl. 9 of Part II. of the First Schedule of the Order.

The result is that the action must be dismissed, but the Crown not claiming costs, without costs.

Solicitors : *Ranger, Burton & Frost ; The Treasury Solicitor.*

H. L. L.

In re THE AGRICULTURAL WHOLESALE SOCIETY, LIMITED.

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April 22, 23.

[00350 of 1924.]

Company—Issue of Loan Stock—Loan Stock Trust Deed—Trustees—Interest—Winding-up Order—Computation of Interest—Bankruptcy Rules—Supreme Court of Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 23—*Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 58—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 207—*Bankruptcy and Deeds of Arrangement Act*, 1913 (3 & 4 *Geo.* 5, *c.* 34), *s.* 22—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 66, *sub-s.* 2 (*b*).

The Society, under a Loan Stock Trust Deed, issued loan stock bearing interest at 7 per cent., with a quinquennial bonus of 2½ per cent. Under the Trust Deed, entered into by the Society with trustees for the stockholders, an amount equal to 7½ per cent. on the par value of the stock was to be paid to the trustees, for apportionment to the interest and to a fund for the bonus. At the date of an order for the winding up of the Society, most of the stockholders had received payment in full of interest at 7 per cent. on the amount of loan stock issued, up to and including a date seven months before the order. The trustees lodged with the liquidator a proof stated to be for cash advanced on loan: and this summons asked (i.) whether the proof should be rejected to the extent of interest proved for above 7½ per cent. up to the date of the commencement of the winding up; (ii.) whether interest should be calculated, at 5 per cent., to the date of the order or to the commencement of the winding up; and (iii.) whether s. 66, sub-s. 2 (*b*), of the Bankruptcy Act, 1914, had any application to proof or dividend in respect of the loan stock:—

Held, (i.) that the amounts proved for by the trustees were to be computed only to the date of the commencement of the winding up; (ii.) that s. 66 of the Bankruptcy Act, 1914, was not incorporated by s. 207 of the Companies (Consolidation) Act, 1908, so as to apply in the winding up of an insolvent company, and that the trustees' proof was therefore calculable at the rate of 7½ per cent.

Quartermaine's Case [1892] 1 Ch. 639 followed.

ADJOURNED SUMMONS.

Under the rules of the Society, which was incorporated under the Industrial and Provident Societies Acts, 1893–1913, the directors had power to obtain loans: and one of the means whereby they might secure repayment of them was the issue of loan stock. On May 26, 1920, the Society brought out a prospectus for an issue of 250,000*l.* of loan stock bearing interest at the rate of 7 per cent. per annum, with an additional quinquennial bonus of 2½ per cent. In the prospectus the

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Society undertook to enter into a trust deed with trustees for the stockholders whereby an amount equal to 7½ per cent. on the par value of the stock would be paid to the trustees, who would apportion it (*a*) to interest at the rate of 7 per cent. per annum to each stockholder; (*b*) as to the balance, to a fund which, after taking into account income tax on investments, would provide a quinquennial bonus of 2½ per cent. to holders of loan stock.

Pursuant to the prospectus, the loan stock was constituted by a trust deed dated October 18, 1920, between the Society and the trustees—the respondents to this summons. By clause 3 of the deed the Society agreed, so long as any of the loan stock should be outstanding, to pay to the trustees by equal half-yearly payments an additional sum equivalent to interest at one half per cent. per annum less income tax on the principal amount of the stock for the time being outstanding, the additional sum payable in respect of stock which had not been fully paid for during the whole of a half-year to be calculated and paid in respect of such half-year in the same manner as in the case of the interest payable on the stock under clause 2, i.e., at 7 per cent. by equal half-yearly payments.

An order for the winding up of the Society was made on July 29, 1924, at which date 71,246*l.* of loan stock had been issued: of this amount 70,101*l.* had been fully paid up; upon the remaining 1145*l.*, only the amount payable on application at the rate of 4*s.* per 1*l.*—namely, 229*l.*—had been paid. Also, at the date of the order, most of the stockholders had received payment in full of interest at 7 per cent. upon the amount of loan stock issued, up to and including December 30, 1923: from that date to the date of the order no interest had been paid.

The trustees of the deed lodged with the liquidator a proof for 74,726*l.* 16*s.* 7*d.*, stated to be for cash advanced on loan and interest due thereon. This proof the liquidator admitted in principle only, and subject to an investigation of the figures, as it did not indicate how the trustees had arrived at that sum: and as the liquidator was uncertain to what

extent the proof ought to be admitted and uncertain also how the sums payable by the Society under clause 3 of the deed ought to be treated, this summons was issued for the determination of the questions (i.) whether the liquidator ought to reject the trustees' proof to the extent of any interest proved for which would exceed $7\frac{1}{2}$ per cent. on the loan stock to the date of the commencement of the winding up; (ii.) whether, for the purposes of dividend, interest on the loan stock ought to be calculated at 5 per cent., and whether to the commencement of the winding up or the date of the winding-up order; and (iii.) whether s. 66, sub-s. 2 (*b*), of the Bankruptcy Act, 1914, had any application to proof or dividend in respect of the loan stock.

R. F. Roxburgh for the liquidator as applicant. The first question, as to the winding up, depends upon s. 58 of the Industrial and Provident Societies Act, 1893. (1) It depends also upon a number of authorities—namely, *Warrant Finance Company's Case* (2); *Ebbw Vale Company's Case* (3); *In re Imperial Land Company of Marseilles. Ex parte Colborne and Strawbridge* (4); *In re International Contract Company, Hughes' Claim* (5); *Quartermaine's Case.* (6) In Stiebel's Company Law, 2nd ed., vol. ii., p. 1370, s. 66, sub-s. 2 (*b*), of the Bankruptcy Act, 1914, is treated as incorporated in s. 207 of the Companies (Consolidation) Act, 1908. (7)

(1) The Industrial and Provident Societies Act, 1893, s. 58, provides as follows:—

"A registered society may be dissolved:—

(*a*) By an order to wind up the society, or a resolution for the winding up thereof, made as is directed in regard to companies by the Companies Acts, 1862 to 1890, the provisions whereof shall apply to any such order or resolution, except that the term 'registrar' shall for the purpose of such winding up have the meaning given to it by this Act; or

(*b*) By the consent of three-fourths of the members, testified by their signatures to an instrument of dissolution."

(2) (1869) L. R. 4 Ch. 643.

(3) (1869) L. R. 5 Ch. 112.

(4) (1870) L. R. 11 Eq. 478, 496, 497.

(5) (1872) L. R. 13 Eq. 623.

(6) [1892] 1 Ch. 639, 649.

(7) The Bankruptcy Act, 1914, s. 66, sub-s. 2 (*b*), provides as follows:—

"In dealing with the proof of the debt, the following rules shall be observed: Any payments made by the debtor to the creditor before the

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[He referred also to Palmer's Company Law, 11th ed., p. 329. See also *In re Young. Ex parte Jones.* (1) A distinction must be made between proof and dividend in the case of bankruptcy: *In re Herbert. Ex parte Jones.* (2)]

H. A. H. Christie for the trustees of the loan stock trust deed as respondents. The rule is that interest, in cases where it is not expressly reserved, is given up to the date of the winding-up order: see Companies (Winding-up) Rules, 1909, r. 97. (3)

MAUGHAM J. I will deal first with the question whether interest is to be calculated to the date of the commencement of the winding up or to the date of the order for winding up. In the present case the difference in the number of days is not very great. I have been referred to all the authorities. It is true that in some cases the learned judges have used ambiguous language, as, e.g., in *Warrant Finance Company's Case* (4), where Selwyn L.J. says simply

receiving order, whether by way of bonus or otherwise, and any sums received by the creditor before the receiving order from the realization of any security for the debt, shall, notwithstanding any agreement to the contrary, be appropriated to principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate."

The Companies (Consolidation) Act, 1908, s. 207, provides as follows:—

"In the winding up of an insolvent company registered in England or Ireland the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England or Ireland, as the case may be, with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

(1) [1896] 2 Q. B. 484.

(2) (1892) 9 Mor. 253.

(3) "On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding up order or resolution, the creditor may prove for interest at a rate not exceeding four per centum per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment."

(4) L. R. 4 Ch. 643, 647.

"the date of the winding up," which might mean the date either of the commencement of the winding up or of the order. Subsequent cases, however, have shown that the date here intended is that of the commencement of the winding up: see *Quartermaine's Case* (1), where Stirling J. clearly showed that he was treating the date of the commencement of the winding up as the proper date. Moreover, the learned authors of Palmer and Buckley take the same view. In these circumstances I have no hesitation in holding that the amounts proved for by the trustees, in respect of the sums due to them on the loan stock trust deed, are to be computed only to the date of the commencement of the winding up. It should be added that rule 10 of the Winding-up Rules does not apply.

The third question is one of some general importance, because, in substance, it is the question whether s. 66 of the Bankruptcy Act, 1914, is incorporated by s. 207 of the Companies (Consolidation) Act, 1908, so as to apply in the winding up of an insolvent company registered in England. If it is so incorporated, there is no doubt that the proof which the trustees of the loan stock trust deed are entitled to make ought to be calculated at the rate of 5 per cent.; if it is not so incorporated, the proof ought to be calculated at the rate of 7½ per cent.

It is to be observed that, in the first instance, the incorporation of certain rules in regard to bankruptcy, whenever applicable, was effected by the Supreme Court of Judicature Act, 1875, s. 10. (2) [His Lordship read the section and

(1) [1892] 1 Ch. 639, 649.

(2) Sect. 10 of the Supreme Court of Judicature Act, 1875, provides (inter alia) as follows:—

". . . . In the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive . . . . out of the assets of any such company, may come in under . . . . the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

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continued:] These were the rules to apply to winding up. The section is not retrospective. It applies only to any winding up after the date of the Act. Moreover, the section did not incorporate into winding up anything like the whole of the rules applicable to bankruptcy. There have been, I suppose, a dozen or more cases in each of which it was decided that the section was limited in its effect by the particular language used.

In the year 1890 the Bankruptcy Act, 1883, was amended, and by s. 23 of the Bankruptcy Act, 1890 (1), it was for the first time provided: [His Lordship read the section and continued:] It is to be observed that that is a special provision, concerning, not the sums for which a creditor can prove in the bankruptcy, but the payment of dividend: and it provides that, for purposes of dividend, interest is to be calculated at a rate of not more than 5 per cent.

A section so expressed as is s. 10 of the Act of 1875 is one which must be construed in strictness: and I do not think that it would be proper to hold that a special section as to payment of dividends is included by natural implication in the words "rules . . . . as to debts . . . . provable."

In 1913, there was a further amendment of bankruptcy law: and by s. 22 of the Bankruptcy and Deeds of Arrangement Act, 1913 (2), there was an amendment of s. 23 of the Act

(1) Sect. 23 of the Bankruptcy Act, 1890, provides as follows:—

"Where a debt has been proved upon a debtor's estate under the principal Act"—i.e., the Bankruptcy Act, 1883—"and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per centum per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

(2) Sect. 22 of the Bankruptcy and Deeds of Arrangement Act, 1913, provides as follows:—

"In dealing with any proof of a debt to which section twenty-three of the Bankruptcy Act, 1890 (which relates to interest on debts), applies, the following rules shall be observed:—

(*a*) Any account settled between the debtor and the creditor within three years preceding the date of the receiving order may be examined, and, if it appears that the settlement of the account forms substantially one transaction with any debt alleged to be due out of the

of 1890. The amendment was: [His Lordship read the section and continued:] Between the passing of the Bankruptcy Act, 1890, and the Bankruptcy and Deeds of Arrangement Act, 1913, the Companies (Consolidation) Act, 1908, was passed: and by s. 207 of that Act, s. 10 of the Supreme Court of Judicature Act, 1875, was in substance re-enacted. The question now to be determined is whether these complicated rules, which are, in effect, amendments to s. 23 of the Bankruptcy Act, 1890, are imported by s. 207 of the Companies (Consolidation) Act, 1908.

For the reasons which I have already given in dealing with s. 23 of the Act of 1890, I think that the language of s. 207 of the Act of 1908 is not wide enough to incorporate s. 22 of the Act of 1913. By s. 66 of the Bankruptcy Act, 1914, the provisions of s. 23 of the Act of 1890 and of s. 22 of the Act of 1913 were re-enacted, practically without alteration: and I am of the opinion that neither the first nor the second sub-section of s. 66 is, by s. 207 of the Act of 1908, applied in the winding up of an insolvent company. I will add that I do not think that the Legislature, when the Act of 1908 was passed, could have intended such a result. That Act is a consolidating Act, and it is not in the least likely that it was intended by s. 207 to extend the bankruptcy rules

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debtor's estate (whether in the form of renewal of a loan or capitalization of interest or ascertainment of loans or otherwise) . . . . the account may be re-opened and the whole transaction treated as one;

(*b*) Any payments made by the debtor to the creditor before the receiving order, whether by way of bonus or otherwise, and any sums received by the creditor before the receiving order from the realization of any security for the debt shall, notwithstanding any agreement to the contrary, be appropriated to principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate;

(*c*) Where the debt due is secured and the security is realized after the receiving order, or the value thereof is assessed in the proof, the amount realized or assessed shall be appropriated to the satisfaction of principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate."

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applicable in a winding up. Further, the provisions of s. 66 of the Act of 1914 are most inconvenient to be applied to a case such as the present. In the case of a company, which is quite different from that of an individual, a debt may have existed for an enormous length of time, without any obligation to repay so long as the company is a going concern. The introduction of s. 66 of the Act of 1914, in the case of an insolvent company, would lead to difficulties which would far outweigh any advantage which might result from diminution of interest.

For these reasons I come to the conclusion that s. 66 of the Act of 1914 is not incorporated by s. 207 of the Act of 1908, with the result that the answer to the third question raised by the summons is in the negative.

Solicitors for applicant: *Stow, Preston & Lyttelton.*

Solicitors for respondents: *Patersons, Snow & Co., for Dibb, Lupton & Co., Leeds.*

K. R. A. H.

ROMER J.

1929

May 7.

In re WELLS.

[1928. W. 3701.]

Administration—Landlord and Tenant—Insolvent Estate—Administrator in Possession—Rent accrued after Order for Administration—Distraint—Effect of Law of Bankruptcy—Creditor—Computation of Interest—Bankruptcy Rules—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 35, 130, *sub-ss.* 1, 5; *s.* 66—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 1, *Sch. I., Part I.*

The lessee of a farm, in respect of which the rent was payable quarterly, died intestate in 1928, and his administratrix entered into possession. Subsequently an order for administration was made in respect of the estate of the lessee, which was insolvent. At the date of the order one quarter's rent was unpaid. A receiver was appointed, and ultimately the lessor, three quarters' rent being by that time due to him, took out a summons, in the administration action, for the purpose of ascertaining whether, having regard to the provisions of s. 34, sub-s. 1, of the Administration of Estates Act, 1925, which applied the law of bankruptcy to the administration of insolvent estates, he was entitled to distrain on the property:—

Held, that there was nothing in the Bankruptcy Act, 1914, which interfered with the landlord's right to distrain, and that he was entitled to distrain for the three quarters' rent.

Ex parte Hale (1875) 1 Ch. D. 285 applied.

A summons in the administration action was also issued by the administratrix, in which an application was made that a creditor might be allowed interest on his debt at the rate of 7 per cent. per annum calculated down to the date of payment:—

Held, that s. 66 of the Bankruptcy Act did not apply, and that proof could be made in respect of the interest claimed.

In re Agricultural Wholesale Society, Ld. ante p. 261 followed.

SUMMONSES IN AN ADMINISTRATION ACTION.

By a lease dated April 26, 1926, the lessor demised to Benjamin Wells for the term of seven years from March 25, 1926, a farm situate in the parishes of Chobham and Windlesham, in the county of Surrey, and known as the Higher Park Farm, at the annual rent of 161*l.* 3*s.*, payable by equal quarterly payments, the first payment to be made on June 24, 1926.

By a further lease dated August 27, 1927, the lessor demised to the said Benjamin Wells about 16½ acres of fields, also situate in the parish of Chobham, for six years, from March 25, 1927, at an annual rent of 53*l.*, payable by equal quarterly payments, the first payment to be made on June 24, 1927.

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The said Benjamin Wells died on March 26, 1928, intestate, and his administratrix entered upon the property, occupied the farm and paid rent in respect of the quarter ending June 24, 1928. Since that date no rent was paid in respect of the property, and the sum of 160*l.* 12*s.* 3*d.*, being rent due for the three quarters ending September 29, 1928, December 25, 1928, and March 25, 1929, respectively, remained due to the lessor.

On November 27, 1928, a summons was taken out for the administration of the estate of the intestate, and on February 26, 1929, a receiver was appointed to receive the rents and profits of the leasehold estates, and to collect and get in the outstanding personal estate of the intestate and to manage his farm, and the administratrix was ordered to deliver over to the receiver possession of the property, so far as was necessary, together with all the live and dead stock about the farm.

The lessor took out a summons in the administration action that he might be at liberty to exercise his right of distraint upon the property comprised in the two leases for the sum of 160*l.* 12*s.* 3*d.*

A summons in the action was also taken out by the administratrix, in which application was made that a creditor of the intestate might be allowed interest on his debt of 665*l.* 4*s.* 5*d.* at the rate of 7 per cent. per annum, calculated to the date of payment.

Cyril Radcliffe for the lessor. The landlord's right to distrain for the rent due to him is not affected by the order for administration made in respect of this insolvent estate. The question for decision, however, is whether, in the circumstances, s. 35 of the Bankruptcy Act, 1914 (1), which relates to distress, is introduced by reason of the provisions contained in s. 34 of the Administration of Estates Act, 1925. (1) The

(1) Sect. 35: "(1.) The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that, if such distress for rent be levied after the commencement

word " priorities " in this section refers only to those priorities introduced by s. 33 of the Act of 1914. That section does not provide for questions relating to rent due after the making of the order.

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of the bankruptcy, it shall be available only for six months' rent accrued due prior to the date of the order of adjudication and shall not be available for rent payable in respect of any period subsequent to the date when the distress was levied, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available.

" (2.) Where any goods of a debtor have been taken in execution, the limit on the amount of rent which the party at whose suit the execution is sued out is liable to pay to the landlord under s. 1 of the Landlord and Tenant Act, 1709, or which the landlord is entitled to be paid under s. 160 of the County Courts Act, 1888, shall, unless notice of claim for rent due has been served on the sheriff or bailiff or other officer levying the execution by or on behalf of the landlord before the commencement of the debtor's bankruptcy, be six months' rent, instead of one year's rent, and the rights of the landlord under the said provisions shall not extend to any claim for rent payable in respect of any period subsequent to the date of such notice, unless such notice was served as aforesaid before the commencement of the debtor's bankruptcy.

" (3.) Nothing in the last preceding sub-section shall be construed as imposing any liability on the sheriff, bailiff or other officer levying the execution, or on the person at whose suit the execution was sued out, to account for any sum actually paid to the landlord by him before notice was served on him that a receiving order had been made against the debtor, but the landlord shall be liable to pay to the trustee in the bankruptcy any sum he may have received from such sheriff, bailiff, officer or person as aforesaid in excess of the amount which he was entitled to be paid, without prejudice, however, to the right of the landlord to prove for the amount of such excess."

Sect. 130: " (1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy.

. . . . . .

" (5.) With the modifications hereinafter mentioned, all the provisions of Part II. of this Act (relating to the administration of the property of a bankrupt) and, subject to any modification that may be made therein by general rules under sub-s. 11 of this section, the following provisions, namely, s. 25 of this Act (which relates to inquiries as to the debtor's conduct, dealings, and property); s. 83 of this Act (which relates to the costs of trustees, managers, and other persons); s. 129 of this Act (which relates to the summary administration of small estates); and sub-s. 4 of s. 93 of this Act so far as it relates to the effect of the release of official

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[He referred to *Ex parte Hale.* (1)]

Church for the receiver. Sect. 130 of the Act of 1914 makes the order for administration equivalent to an adjudication in bankruptcy. Sect. 34 of the Administration of Estates Act, 1925, places all creditors, secured or otherwise, on the same footing. Assuming that an order for administration is equivalent to an adjudication in bankruptcy, one quarter's rent, only, was due at the date of the order for administration, and in the circumstances the right to distrain is limited under the Bankruptcy Act to one quarter's rent.

After the order for administration the landlord had no right to distrain, but under the Bankruptcy Act he can apply for relief. The lessor could distrain for one quarter's rent unless the Administration of Estates Act alters the position so as to deprive him of his right to distrain.

Radcliffe in reply referred to *In re Fryman's Estate.* (2)

ROMER J. This is an application in an administration action by the lessor of two sets of premises of which the intestate had been the lessee. The estate was insolvent, and the lessor claimed to be at liberty to distrain on the leasehold premises in respect of rent due to him. The intestate died in March, 1928. The defendant in the action

receivers; shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act, and sub-s. 1 of s. 35 of this Act shall apply as if for the reference to an order of adjudication there were substituted a reference to an administration order under this section."

Administration of Estates Act, s. 34, sub-s. 1: "Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the first schedule to this Act. . . . . First Schedule. Part I. Rules as to payment of debts where the estate is insolvent. (1.) The funeral, testamentary and administration expenses have priority. (2.) Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

(1) 1 Ch. D. 285.

(2) (1888) 38 Ch. D. 468.

is his administratrix. The order for administration was made on December 12, 1928. The last payment of rent was made for the quarter ending June 24, 1928. Since that time no rent has been paid to the lessor, but the administratrix occupied the two leasehold premises until February 26, 1929, on which date a receiver and manager was appointed, and from that date the receiver has carried on the business for the benefit of the creditors.

At the present time there is due to the lessor three quarters' rent, of which one quarter's rent became due in September, 1928, antecedent to the judgment for administration. The rest of the rent has become payable since the order was made. Now the application is opposed by the receiver on the ground that there is something in the Bankruptcy Act, 1914, or, failing that, in the Administration of Estates Act, 1925, which prevents the Court from acceding to the application in full. First, as regards the Bankruptcy Act, 1914, it is provided as follows: [His Lordship read s. 35, sub-ss. 1, 2 and 3, and s. 130, sub-ss. 1 and 5, and continued:] It is said that the order of December, 1928, must be treated as an administration order within the meaning of sub-s. 5 of s. 130. In the first place, sub-s. 5 has, in my opinion, no application to any order other than an order made by the Bankruptcy Court; it does not apply to such an order as that in the present case. Secondly, I am of opinion that in any case there is nothing in the sub-section preventing the landlord from distraining under the order in the present case. The rent due in September accrued due within 6 months of the administration order, and s. 35 has no reference to the rent due after the making of the order: see *Ex parte Hale.* (1) In that case Bacon C.J. pointed this out when dealing with the corresponding section of the Act of 1868. There the trustee in bankruptcy did not disclaim the lease, but continued in occupation of the premises for the purposes of winding up the estate, and the landlord, accordingly, levied distress in respect of the rent which became due after the making of the order. The action was commenced for the purpose of restraining the

(1) 1 Ch. D. 285.

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landlord, and it was argued that the corresponding section disentitled the landlord from proving for more than twelve months' rent. Bacon C.J. said: (1) "If I were to accede to Mr. Beaumont's argument, the consequence would be that a trustee in bankruptcy might make use of a man's property without paying any rent for it, and might snap his fingers at him. The meaning of s. 34 is that, if a landlord has been so weak as to allow his tenant to get into arrear with his rent for more than a year, he can, in the event of the tenant's bankruptcy, only prove as an ordinary creditor for the arrears beyond the year. It does not restrain his rights in any other way. There is no ground whatever for this injunction."

It is now necessary to consider the Administration of Estates Act, 1925. It is provided by s. 34, sub-s. 1, of that Act that: [His Lordship read the sub-section and Part I. of the First Schedule and continued:] I have asked what part of that rule ought to induce me to refuse the landlord's application, and the only answer suggested was the words, "as to the priorities of debts and liabilities." But the restrictions upon the right of the landlord to distrain for rent do not seem to me to have anything to do with the priorities of debts and liabilities. Even if it were otherwise, priority is given in respect of six months' rent accrued due before the order of adjudication and, as regards rent accruing due after the commencement of the bankruptcy, there is not, as I have already pointed out, anything in the Bankruptcy Act which interferes with the landlord's right to distrain.

In my opinion leave ought to be given to the applicant to distrain for the three quarters' rent in question. It is said that there are no distrainable assets on one of the premises, and, that being so, the landlord must be given liberty to re-enter so far as there are distributable assets on the other premises.

Vanneck for the administratrix. With regard to the second summons, the creditor is entitled to interest at 7 per cent. per annum: see *In re Agricultural Wholesale Society, Ld.* (2) The words of s. 207 of the Companies (Consolidation)

(1) 1 Ch. D. 287. (1) Ante, p. 261.

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Act, 1908, with which that case was concerned, are almost identical with those of para. 2 of the First Schedule to the Administration of Estates Act, 1925. The same principle applies to the case of an insolvent estate. Sect. 66 of the Bankruptcy Act, 1914, is, therefore, not incorporated in the First Schedule to the Administration of Estates Act, 1925.

Church for the receiver.

ROMER J. I shall follow the decision of Maugham J. in *In re Agricultural Wholesale Society, Ld.* (1), which was a decision given not on the First Schedule of the Administration of Estates Act, 1925, but on the words of s. 207 of the Companies (Consolidation) Act, 1908. The only substantial difference is that in the Schedule these words, which are not to be found in the section, appear: "And as to the priorities of debts and liabilities." I do not think, however, that those words are sufficient to distinguish the two cases, and I hold that s. 66, sub-s. 1, of the Bankruptcy Act is not made applicable in the administration of an insolvent estate by virtue of s. 34, sub-s. 1, and s. 2 of Part I. of the First Schedule of the Administration of Estates Act, 1925. The result is that the creditor must be allowed interest on his debt at the rate of 7 per cent.

Solicitors: *Vandercom, Stanton & Co.; Sherrard & Sons; Foster, Spicer & Foster.*

(1) Ante, p. 261.

J. L. D.

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April 17; *May* 15.

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[1928. P. 1126.]

Will—Settled Land—Tenant for life—Taxes, rates and repairs payable out of specific sum—Gift over—Limitation against exercise of powers of tenant for life—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 106—*Charitable gift—Gift to club—Nursery fund of cricket Club—Validity.*

A testator by his will, dated November 22, 1927, directed his trustees to retain 3000*l.* and to apply the interest yearly in payment of the taxes, rates and repairs of his freehold house, and he desired that his aunt should "have the use of it and my furniture free of cost for her occupation during her life or so long as she may require them, but without the power to sub-let the same or any part thereof on the termination of her occupation the house is to be sold," and from the proceeds, added to the above 3000*l.*, certain specific legacies were given. He also directed that when the house had been sold, his nephew, G. P., should have the furniture. The testator also gave three legacies in the following terms:—"To the Junior Carlton Club, Pall Mall, S.W.: 100*l.* of Funding Loan in trust to pay the interest yearly to the Staff Christmas Fund. To the Union Club, Brighton: 100*l.* of Funding Loan in trust to pay the interest yearly to the Staff Christmas Fund. To the Sussex County Cricket Club: 300*l.* of Funding Loan in trust to pay the interest yearly to the Nursery Fund":—

Held, (1.) that the provision forbidding the tenant for life to sub-let was void under sub-s. 1 of s. 106 of the Settled Land Act, 1925, and that the provision requiring the house to be sold and the gift over of the proceeds of sale upon the termination of her occupation was also avoided by that sub-section, so far as that provision would operate in the event of her exercising any of her powers as tenant for life;

(2.) that the gift over of the 3000*l.* was a provision which tended to induce her to abstain from exercising her powers of leasing as a tenant for life, and was void, therefore, in so far as it had that tendency; and that it should be read to take effect only upon her ceasing to reside for any reason other than the exercise of her powers of leasing as a tenant for life;

(3.) that in the event of her selling the house she would not be entitled to be paid any part of the income of the 3000*l.*;

(4.) that she was entitled to the furniture during her life or until she ceased to occupy the house for any reason other than the exercise of her powers as tenant for life;

(5.) That the legacies to the clubs were not charitable and, therefore, invalid.

In re Trenchard. Ward v. *Trenchard* (1900) 16 T. L. R. 525 doubted.

In re Simpson [1913] 1 Ch. 277 followed.

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The testator, William Fletcher Moore Patten, by his will made on November 22, 1927, appointed Westminster Bank, Ld., to be executor and trustee of his will, and directed as follows (inter alia): "I direct my trustees to retain the sum of 3000*l.* and to apply the interest yearly in payment of the taxes rates and repairs of my freehold house 44 First Avenue Hove and I desire that my Aunt Phyllis Patten shall have the use of it and my furniture free of cost for her occupation during her life or so long as she may require them but without the power to sub-let the same or any part thereof on the termination of her occupation the house is to be sold and from the proceeds of the sale added to the above 3000*l.* 2000*l.* are to be paid to the Alton Children's Hospital and College for the support of a child and 1000*l.* to the Reedham Orphanage for the support of a child. . . . . When the house at 44 First Avenue has been sold I wish my nephew George Patten to have my . . . . furniture." The will also contained the following legacies: "To the Junior Carlton Club Pall Mall S.W. 100*l.* of Funding Loan in trust to pay the interest yearly to the Staff Christmas Fund. To the Union Club Brighton 100*l.* of Funding Loan in trust to pay the interest yearly to the Staff Christmas Fund. To the Sussex County Cricket Club 300*l.* of Funding Loan in trust to pay the interest yearly to the Nursery Fund."

The testator died on February 9, 1928, and his will was duly proved on May 2, 1928.

This summons was taken out by the bank as executor and trustee of the will for the determination (inter alia) of the following questions: (1.) Whether, having regard to s. 106 of the Settled Land Act, 1925, the said Phyllis Patten was entitled during her life or if for any less period then for what period to (*a*) the said freehold house; (*b*) the furniture in the house; (*c*) the income of the said sum of 3000*l.*; (2.) how and for what period the trustees ought to apply the income of the said sum of 3000*l.* and in particular (3.) whether during the life of Phyllis Patten or any less period they ought from time to time to hold or apply the

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yearly income thereof not required for the payment of the rates taxes and repairs of the house as income of the residuary estate or as income undisposed of by the will; (4.) whether effect ought to be given by the executor to any and if so which of the above mentioned legacies to the Junior Carlton Club, the Union Club, Brighton, and the Sussex County Cricket Club.

Nicholson Combe for the trustees.

Morton K.C. for the tenant for life. There is a clear gift over of the 3000*l.* and of the furniture. This gift over is void by virtue of the provisions of s. 106 of the Settled Land Act, 1925, as it is an inducement to the tenant for life to refrain from exercising the powers of a tenant for life. The object of the section is that tenants for life shall not be restrained from exercising the powers conferred upon them by the Settled Land Acts.

[He referred to *In re Trenchard. Ward* v. *Trenchard* (1); *In re Trenchard. Trenchard* v. *Trenchard* (2); *In re Simpson.* (3)]

G. D. Johnston for the trustees of the Alton Charity. *In re Simpson* (3) is in point as regards the 3000*l.* It does not follow that the tenant for life will benefit under this disposition. The words of s. 106 of the Act of 1925 do not refer to some imaginary event which might have some influence in persuading the tenant for life to do one thing or another, but to something concrete.

J. Leonard Stone for the Reedham Orphanage. The primary object of the disposition relating to the 3000*l.* is the upkeep of the property. Indirectly the tenant for life may derive some benefit, but so also do the remaindermen.

C. R. R. Romer for the residuary legatees.

Hind, Elverston and *J. W. F. Beaumont* for the Junior Carlton Club, the Union Club, Brighton, and the Sussex County Cricket Club respectively, in support of the contention that the gifts to the respective clubs were valid, referred to *Reeve* v.

(1) 16 T. L. R. 525. (2) [1902] 1 Ch. 378.
(3) [1913] 1 Ch. 277.

Attorney-General (1); *Loscombe* v. *Wintringham* (2); *In re Gosling*. (3)

Stafford Crossman for the Attorney-General. There is ample authority to show that these gifts are not charitable.

[He referred to *In re Drummond* (4) and *In re Clifford*. (5)]

Cur. adv. vult.

May 15. ROMER J. Several of the questions still remaining to be decided upon this summons relate to certain dispositions contained in the testator's will which, so far as material for the present purpose, are in these terms: "I direct my trustees to retain the sum of 3000*l.* and to apply the interest yearly in payment of the taxes rates and repairs of my freehold house, 44 First Avenue, Hove, and I desire that my Aunt Phyllis Patten shall have the use of it and my furniture free of cost for her occupation during her life or so long as she may require them, but without the power to sub-let the same or any part thereof; on the termination of her occupation the house is to be sold and from the proceeds of sale added to the above 3000*l.* 2000*l.* are to be paid to the Acton Children's Hospital and College and 1000*l.* to the Reedham Orphanage. When the house has been sold I wish my nephew George Patten to have my furniture."

It is admitted, and rightly admitted having regard to the decision in *In re Boyer's Settled Estates* (6), that Mrs. Patten is a person who has the powers of a tenant for life under s. 20, sub-s. 1 (vi.), of the Settled Land Act, 1925, in respect of the house in question. She desires, however, to know what her position will be as to the house, the pictures, and the interest on the 3000*l.* in the event of her ceasing to reside there. Should she cease to occupy the house for any reason other than the exercise by her of her powers as a tenant for life, there can be no question but that the directions contained in the will to take effect on the termination of her occupation will at once come into operation. She may, however, cease

(1) (1843) 3 Hare, 191.
(2) (1850) 13 Beav. 87.
(3) (1900) 48 W. R. 300.
(4) [1914] 2 Ch. 90.
(5) (1911) 81 L. J. (Ch.) 220.
(6) [1916] 2 Ch. 404.

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to occupy the house by reason of an exercise by her of her powers of a tenant for life, and in that case it becomes necessary to consider the provisions of s. 106 of the Settled Land Act. But before doing so, it will be convenient to ascertain what, according to the terms of the will, are the trusts upon which the 3000*l.* are to be held. It was contended on behalf of Mrs. Patten that during her residence at the house the trusts of the interest accruing on this sum were solely for her benefit, that the payment of the rates taxes and repairs was merely one method indicated by the testator of utilizing the interest for her benefit, and that she was entitled to be paid such interest so far as it was not exhausted by the particular payments in question. I am unable to take this view. Mrs. Patten would of course be benefited by having the rates and taxes and repairs paid for during her residence, but so far as repairs are concerned the persons entitled to the proceeds of sale of the house when sold are also interested in having it kept in a proper state of repair until the sale. In my opinion the only trust declared by the will in respect of the interest of the 3000*l.* is to apply it in payment of the rates, taxes and repairs, and I cannot find any indication of the testator's intention that any surplus after discharging that trust should go to Mrs. Patten. Should there be any surplus it would appear to be undisposed of and would fall into residue.

I must now consider the effect of s. 106 upon the provisions of the will to which I have referred. There is nothing in these provisions purporting or attempting to forbid Mrs. Patten to exercise any power under the Act except the direction that she shall not have power to sub-let. That provision obviously falls within para. (*a*) of the first sub-section and is to be deemed void. The provision requiring the house to be sold and the gift over of the proceeds of such sale upon the termination of Mrs. Patten's occupation is also avoided by the first sub-section so far as the provision would operate in the event of her exercising any of her powers as a tenant for life, either because it comes within para. (*b*) of the sub-section, or because her estate or interest may be regarded as limited

to continue so long only as she abstains from exercising any of such powers, and must therefore by virtue of sub-s. 2 be and take effect as an estate or interest to continue during her life or until she shall cease to occupy for any reason other than the exercise by her of any of such powers. If therefore Mrs. Patten in exercise of such powers should let or sell the house she will be entitled to receive during her life the rent or the interest of the proceeds of sale, as the case may be.

The question of what effect s. 106 has upon the 3000*l.* and the furniture is, however, one of greater difficulty. And first as to this 3000*l.* In connection with this my attention was called to the decision of Byrne J. in *In re Trenchard* (1), a case decided upon s. 51 of the Settled Land Act, 1882, a section which for the present purpose differed in no material respect from s. 106, sub-ss. 1 and 2, of the present Act. In that case a testator gave to his widow the use of a certain house so long as she should desire to make it her permanent place of residence, his estate to pay all rates, taxes and outgoings in respect thereof and to keep the house and grounds in tenantable repair. The widow claimed to be entitled as tenant for life to sell the house and receive the income of the proceeds. It was held that this claim was well founded. But she also claimed in the event of such a sale to receive out of the testator's estate such a further sum in each year during her life as should be equivalent to the rates, taxes and outgoings of the house. As to this, according to the report, the learned judge said that the point was "whether the direction contained in the will as to the payment of the rates, taxes and outgoings, so long as she should desire to make it her permanent place of residence, was such as would deprive the lady of all interest in the portion of the testator's estate properly applicable to such payment in the event of her selling the residence and therefore a prohibition or limitation, void within the meaning of s. 51 of the Act, as preventing the tenant for life from exercising, or as inducing her to abstain from exercising, or as putting her into a position inconsistent with her exercising her powers under the Act,

(1) 16 T. L. R. 525.

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or as tending to bar that operation. He was of opinion that, so far as the direction in the will made it a condition that the benefit of the payments in question was to be dependent upon residence, it was void within s. 51, and that the widow's interest in such sums continued during her widowhood independently of her residing in the house."

With all respect to the learned judge, I feel great difficulty in understanding this decision. What provision in the will would have prevented her from exercising or would have induced her to abstain from exercising, or put her into a position, inconsistent with her exercising the power of sale? If the answer to this question be that it was the direction to pay the rates, taxes, outgoings and repairs out of the testator's general estate during her residence, then that provision was void in so far as it had that effect. The result of this would be either that the whole provision was void, which is absurd, or that the confining of this provision to the duration of her residence was void. The provision was not, however, in terms so confined, and even if it had been, I see much difficulty in treating the section as enlarging the directions contained in the will unless recourse be had to sub-s. 2 and the direction for payment be regarded as creating an estate or interest limited to continue so long as the widow abstained from exercising her power of sale. But supposing that the direction could be treated, by reason of one or other of the provisions contained in the section, as a direction to make the payments during the widow's life, I am unable to find anything in the section that could justify the Court in further disregarding the provisions in the testator's will, and treating the direction as one to pay the rates, taxes, outgoings and repairs while the house remained unsold, and an equivalent sum to the widow during the remainder of her life after a sale had taken place, and the house had consequently ceased to form part of the testator's estate. But, notwithstanding these doubts of mine, I might have felt it my duty to follow Byrne J.'s decision in the present case were it not for the fact that in *In re Simpson* (1) Swinfen

(1) [1913] 1 Ch. 277, 282.

Eady J. took a different view as to the application of the section to a somewhat similar state of facts. In that case the testator made a specific bequest as follows: "I give my leasehold dwelling-house known as Fairlawn situate in Westbourne Road Edgbaston aforesaid in which I now reside to my executors and trustees in trust to permit my said wife to occupy the same during her life if she shall so long continue my widow, my trustees paying the ground rent and all rates taxes and outgoings payable in respect of the said dwelling-house, doing all necessary repairs and observing and performing the covenants contained in the lease under which the same is held out of my general estate it being my wish that my said wife shall be personally relieved from the payment of the ground rent rates taxes and outgoings cost of repairs and the observance and performance of the covenants aforesaid; and I declare that from and after the decease or second marriage of my said wife (which shall first happen) the said dwelling-house shall fall into and form part of my personal estate."

After the testator's death his widow continued to reside in the house for some years, during which time the trustees paid the ground rent and other outgoings amounting to about 160*l.* a year. She then sold the house as tenant for life, but claimed to be paid out of the general estate the sum of 160*l.* during the joint continuance of the lease and her widowhood. In rejecting that claim Swinfen Eady J. expressed himself as follows: "The widow . . . . says that as she had a right to occupy the house free of ground rent, rates, taxes, outgoings and cost of repairs amounting in all to 160*l.* a year, which were payable out of the general estate, she ought now to receive an annuity of that amount out of the general estate, which no longer has to pay the actual rent and outgoings. She contends that having regard to s. 51 (1) this extra benefit conferred on her by the will cannot be put an end to by a sale under her statutory power. In my judgment the provision for payment of rent and outgoings does not fall within s. 51 at all. It is merely an extra benefit conferred

(1) Of the Settled Land Act, 1882.

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on the widow to enable her to reside in the house without the expense of these outgoings. It is true that while she was in occupation she was free from these outgoings, but I am of opinion that the provision conferring this extra benefit on her was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51." The learned judge then referred to *In re Trenchard. Ward* v. *Trenchard* (1), and came to the conclusion that Buckley J. had taken a different view from that of Byrne J. on a subsequent application (2) to confirm a compromise in the same matter come to between the widow and the parties interested in remainder. I have carefully read the judgment given by Buckley J. on that occasion, and for myself have been unable to discover anything to suggest that Buckley J. expressed or even indicated by implication that he disagreed with Byrne J. The point was not in any way considered by him. But, however that may be, I have the clear expression of Swinfen Eady J.'s own view that in a case such as the present the tenant for life is not entitled after a sale to be paid during her life the money that would but for this sale have been expended in outgoings. In the present case the trust is to pay out of the interest from the 3000*l.* the taxes, rates and repairs. There is no provision as to how long that trust is to continue except what is to be implied from the gift over of the 3000*l.* on the termination of Mrs. Patten's occupation, the effect of which I will consider in a moment. But whatever may be the duration of that trust, I can find nothing in s. 106 of the Settled Land Act, 1925, that can have the effect of turning it into a trust to pay any part of the interest to Mrs. Patten. It is, however, a trust to apply the income in payment of the outgoings and but for the gift over is a trust that would endure so long as the house remained subject to the trusts of the will. That being so, it appears to me that the gift over of the 3000*l.* upon the termination of Mrs. Patten's occupancy is a provision that tends to induce her to abstain from exercising her powers of leasing as a tenant for life,

(1) 16 T. L. R. 525. (2) [1902] 1 Ch. 378.

and is therefore void in so far as it has that tendency. The gift over should therefore be read as one to take effect only upon her ceasing to reside for any reason other than the exercise of her powers of leasing as a tenant for life. If she should let the house the trust will accordingly continue and she will benefit by obtaining a larger rent. But there can be no necessity for preventing the gift over taking effect upon her selling, for it is not the gift over that tends to induce her not to exercise that power; it is the fact that, upon selling, the trust for payment of the outgoings comes to an end by reason of the nature of that trust, and for the reasons I have given I cannot treat its nature as being altered by any of the provisions of the section.

The furniture, however, stands upon a different footing. According to the will Mrs. Patten is entitled to the use of the furniture until the termination of her occupation of the house, and on that event happening the furniture is given over. Now I agree that it does not necessarily follow that this gift over of the furniture tends to induce her to abstain from exercising her powers as tenant for life, but prima facie it would have such a tendency, and there is no evidence before me to suggest that it would not. Furthermore her interest in this furniture is in effect one limited to continue so long only as she abstains from exercising her powers as tenant for life, and must therefore be regarded as one that continues for the period during which it would continue if she were so to abstain. I hold that Mrs. Patten is entitled to the furniture during her life or until she ceases to occupy the house for any reason other than the exercise of those powers.

The only other questions remaining to be decided have reference to three legacies given by the testator in the following terms: "To the Junior Carlton Club, Pall Mall, S.W. 100*l.* of Funding Loan in trust to pay the interest yearly to the Staff Christmas Fund. To the Union Club Brighton 100*l.* of Funding Loan in trust to pay the interest yearly to the Staff Christmas Fund. To the Sussex County Cricket Club 300*l.* of Funding Loan in trust to pay the interest yearly to the Nursery Fund."

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It appears that the Staff Christmas Fund of the Junior Carlton Club is a fund which consists of donations given annually by members of the Club which are distributed among the staff of the Club in January of each year by the Club's secretary. The method of sharing the fund is as follows: Each servant gets one share for each complete six months' service at the Club with a limit of twenty shares for any one servant and no difference is made in consequence of more or less responsibility being entailed by the position held by any individual servant.

As regards the Brighton Union Club, no Staff Christmas Fund appears ever to have been constituted, but subscriptions for the staff are given voluntarily by the members annually, the amount received being distributed amongst the staff when the list is closed.

It further appears that the Sussex County Cricket Club in the year 1908 established a special fund which has ever since been maintained by voluntary contributions and subscriptions for the purpose of teaching and coaching young cricketers in the game of cricket so as to enable them to earn their livelihood by becoming cricket professionals and of furthering the interest of cricket as a national game, such fund being known as the Nursery Fund. All the moneys received for the fund are spent in the payment of a professional cricketer in teaching and coaching young cricketers in the game of cricket and in paying the incidental travelling and other expenses incurred in connection with his employment. It is stated that during the past seven years thirty-one boys or thereabouts mainly between the ages of seventeen and twenty-one have by means of the said fund received instruction in the said game, and that about twenty-one of these boys are now being employed as professional cricketers by the Club or by other clubs and schools in the county of Sussex and other parts of the south of England, and Mr. Godfree, who is a member of the Committee of the Club, says that the parents of the boys so taught are, he believes, all of the working or the lower middle classes and not well off financially.

As regards all these legacies it was contended that notwithstanding the trusts imposed upon the legatees to pay the interest yearly to a particular fund the legacies ought to be treated as absolute legacies to the several legatees which could be applied by them at once for the purpose of the several funds respectively and that therefore no question of perpetuity arises by reason of the trusts to apply the interest, even if it should be held that the trusts are not charitable. A sufficient answer to this contention is, in my opinion, to be found in the decision of Swinfen Eady J. in *In re Clifford* (1), where that learned judge had to consider the question whether a legacy to the Oxford Angling and Preservation Society on condition that the President and Committee of the Society should invest the sum as capital money and apply the income or dividends for the purpose of re-stocking their waters or to such other purposes as the President or Committee for the time being should resolve upon was a valid legacy. The learned judge, after deciding that the gift could not be supported as a charitable gift, proceeded to deal with the contention that the bequest was not invalid as a perpetuity since the society was a voluntary one and the members might dissolve it at any time and divide its funds. As to that contention the learned judge said this: "The words of the gift distinctly point to a perpetuity. It is not a gift to a society which the members can immediately divide between them as was the case in *Cocks* v. *Manners*." (2) And then, after referring to that case, he quoted a passage in the judgment of Byrne J. in *In re Clarke* (3), where he said: "It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good." And then Swinfen Eady J. said: "It is obvious in this case there is such a trust. The money is given only on condition that the society applies it in a certain

(1) 81 L. J. (Ch.) 220. (2) (1871) L. R. 12 Eq. 574.
(3) [1901] 2 Ch. 110, 114.

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way, and that condition makes it invalid as offending against the rule as to perpetuities." He accordingly held that the legacy was bad.

I am unable to distinguish this case from the one before me, and in these circumstances I must consider whether the trusts declared by the testator of the three several legacies are or are not charitable.

It was contended that the trusts in favour of the Staff Christmas Funds of the two Clubs are good charitable trusts on the ground that they are trusts for the encouragement of good servants, and I was referred to the cases of *Reeve* v. *Attorney-General* (1) and *Loscombe* v. *Wintringham* (2) as authorities for the proposition that such a trust is charitable. In the former of these cases a testator, after exhorting servants to be obedient unto their own masters, and to please them well in all things, not answering again, and not purloining, but having all good fidelity and denying ungodliness and worldly lusts, and to live soberly, godly and righteously, proceeded as follows: "For such servants, and the like limitation to the principality of Wales, which contains 42,274 female servants, I give 1000*l.* in the said new 3*l.* 10*s.* per cent. Annuities to the 'Society for the Encouragement of Female Servants,' held at 110 Hatton Garden, or elsewhere, in trust to pay the yearly dividends, 35*l.*, in sums of 1*l.* to each such female servant, once only, on their producing a certificate, to be entered on the books of the society, signed by the minister and churchwardens of their parish, of their regular attendance at church, and by their masters or mistresses of their ten years' quiet and faithful service, at 5*l.* or less per annum, and of their never having been married or pregnant." In point of fact, the society mentioned by the testator declined the trusts of the legacy as not being within the purposes for which it was constituted, and it was held that the Court would nevertheless carry the trust into effect by means of a scheme. I cannot find, however, that the question whether the trust was a charitable one was argued, though undoubtedly it was assumed by Wigram V.-C. that such was the case.

(1) 3 Hare, 191. (2) 13 Beav. 87.

The Vice-Chancellor presumably considered that such a trust was beneficial to the inhabitants of Wales, on the ground that it tended to provide those inhabitants with good servants.

In the second of the two cases there was a bequest of a legacy "to the governors guardians and trustees of a society instituted for the increase and encouragement of good servants to the intent and purpose that" the legacy "might be paid to the governors guardians and trustees of the said society for the increase and encouragement of good servants." No such society could be found, but Lord Langdale M.R. said he thought there was a sufficient charitable gift. He said: "I cannot at present persuade myself that this is not a charitable and public purpose; and I cannot suppose that the testator had a special intention in favour of this particular society only." There again the trust was sustained on the ground that it was for the public benefit.

In the present case it is by no means apparent that the prospect of sharing in the Staff Christmas Fund would necessarily result in ensuring that the two Clubs are supplied with good servants. But whether this be so or not, I cannot think that the public are in any way interested in the question whether the members of the two Clubs are well or ill served. In my opinion these two trusts are not charitable.

As regards the trust for the benefit of the Nursery Fund of the Sussex County Cricket Club it was argued that the trust is one for the "supportation aid and help of young tradesmen handicraftsmen and persons decayed" within the meaning of the statute of Elizabeth. In my opinion a professional cricketer is neither a tradesman, a handicraftsman nor a person decayed, and though undoubtedly, as a result of the administration of the fund, boys all of the working or lower middle classes and not well off financially may be embarked upon life as professional cricketers, it is, I think, reasonably clear that the object of the fund is the encouragement of the game of cricket and nothing else, and it has been held by authorities that are binding upon me that such a bequest is not charitable. In *In re Nottage* (1) Lindley L.J.,

(1) [1895] 2 Ch. 649, 655, 656.

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in holding that a trust to provide a cup to be given annually to the most successful yacht of the season was not charitable, said this: "There is great difficulty in drawing the line between gifts which are charitable, in the wide sense in which lawyers use the term, and gifts which are not charitable; but this gift is, in my opinion, decidedly beyond the line. It is a prize for a mere game. The testator himself tells us what was in his mind: 'My object in giving this cup is to encourage the sport of yacht-racing.' Now, I should say that every healthy sport is good for the nation—cricket, football, fencing, yachting, or any other healthy exercise and recreation; but if it had been the idea of lawyers that a gift for the encouragement of such exercises is therefore charitable, we should have heard of it before now." Lopes L.J. said (1): "I am of opinion that a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such sport or game is to some extent beneficial to the public. If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts for promoting bicycling, cricket, football, lawn-tennis, or any outdoor game, were not charitable, for they promote the health and bodily well-being of the community."

The result is that all the three legacies are invalidly given.

Solicitors: *Montagu's & Cox & Cardale, for Howard Gates & Ridge, Hove; Norton, Rose & Co.; Wigan & Co., for FitzHugh, Woolley, Baines & Woolley, Brighton; Sharpe, Pritchard & Co.; Hyde, Mahon & Pascall; Stones, Morris & Stone; Woodcock Ryland & Parker; Treasury Solicitor.*

(1) [1895] 2 Ch. 656.

J. L. D.

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Feb. 28; *March* 1, 4, 27.

[1926. A. 975.]

Local Government—Corporation—Power to run Omnibuses—Area of Local Authority's Powers—Statutory Power to run Tramways—Specified Route inside City—Boundaries—Payment of Expenses out of City Fund—Cost of Running—Defined Route for Omnibuses—Ultra Vires Acts by Corporation—Application of Local Statutes—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 140, *sub-ss.* 1, 2, 3 (*a*); *Fifth Schedule. Part II., s.* 11—*Leeds Corporation* (*Consolidation*) *Act*, 1905 (5 *Edw.* 7, *c. i.*), *ss.* 4, 77, 92, 97, 337—*Leeds Corporation Act*, 1908 (8 *Edw.* 7, *c. lxviii.*), *s.* 27—*Leeds Corporation Act*, 1914 (4 & 5 *Geo.* 5, *c. cxli.*), *s.* 19, *sub-ss.* 1, 9—*Leeds Corporation Act*, 1927 (17 & 18 *Geo.* 5, *c. ci.*), *s.* 101.

The corporation of Leeds, a municipal corporation, had by virtue of their special Act—the Leeds Corporation (Consolidation) Act, 1905, s. 92—power to maintain and run a service of omnibuses within the city or outside the city boundaries. In the latter case, their special powers only extended to the running of omnibuses along the route of any tramways which the corporation should be authorized to construct. There were in fact two such authorized tramway routes. The expenditure in connection with the running of these authorized tramways could —under the corporation's statutory powers—be borne out of the city fund. The corporation began an omnibus service in pursuance of their statutory powers, but it appeared that for a very small portion of the omnibus route—namely, for a distance of 40 yards—the service of omnibuses ran outside the boundaries of the city, joining up with the tramway routes lightly further on, and that the expenses in connection therewith were borne by the city fund.

An action was commenced by a ratepayer for a declaration (inter alia) that the running of these omnibuses over this particular stretch, and payment of the expenses in connection therewith out of the city fund, was ultra vires the statutory powers of the corporation, and ought to be prohibited. The question at issue was whether, so far as the 40 yards stretch was concerned, the corporation were entitled to spend moneys out of the city fund in connecting an authorized route of omnibuses outside the city with a route of omnibuses within the city boundaries. Under their statutory powers the corporation's service of omnibuses along the route of a tramway outside the city which they were authorized to construct, was a part of their tramways undertaking, and they were also authorized to apply the city fund in discharging the expenses in connection with the tramways undertaking:—

Held, that the expense of running omnibuses over the 40 yards so as to connect the two routes was an expense fairly incidental to the tramways undertaking, and that it was not ultra vires the corporation's statutory powers to expend any part of the city fund in working and

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running the omnibuses over the 40 yards which connected the two services, and which were branches of the corporation's tramways undertaking.

ACTION.

The facts of the case are more fully set out in the judgment of the learned judge, but are shortly as follows. The plaintiff (the relator) claimed a declaration that the defendants were not entitled to run or work omnibuses along certain routes outside Leeds, except on certain portions, or to use any part of the city fund for such purposes, and he claimed an injunction to restrain the defendants, their agents and employees from this user. By his statement of claim the plaintiff, after stating that the defendants, in exercise of express powers conferred upon them by private or local statutes, had been running omnibuses within the city of Leeds, and in July, 1926, had commenced to work and run a regular service of omnibuses between Aire Street within the city of Leeds and the district of Pudsey outside the boundaries, alleged (para. 5) that the route of such omnibus service was by way of a road called Hough Side Road in Pudsey; and for a distance of 716 yards or thereabouts was outside the boundaries of the city of Leeds. By para. 6 the plaintiff further alleged that in or about October, 1927, the defendants had commenced and had ever since continued to work and run another service of omnibuses between the street called Vicar Lane within the city and Stanhope Drive in the district of Horsforth outside the city boundaries. The plaintiff further stated (para. 7): "The route followed by the defendants' omnibuses engaged in the said last mentioned service passes along Horsforth Lane which is partly within and partly outside the boundaries of the said city and such route is for a distance of 40 yards or thereabouts outside the boundaries of the said city." Para. 8: "The defendants have expended and are continuing to expend part of the city fund and of other funds and moneys belonging to the ratepayers of the city in providing and maintaining omnibuses for the said services and in working and running such omnibuses outside the boundaries of the said city."

Further, the plaintiff, while admitting that the defendants had by virtue of the Leeds Corporation (Consolidation) Act, 1905, s. 92, and the Leeds Corporation Act, 1927, s. 101, powers to provide, work and run omnibuses beyond the said city along the route of any tramways which they had been or should be authorized to construct, and also certain other named routes, had no statutory or other powers to work or run omnibuses outside the city boundaries, nor had they been authorized to construct any tramways along the routes mentioned in paras. 5 and 7 of the statement of claim in so far as they were outside the city boundaries. In so far as the said routes lay outside the city boundaries, it was beyond the power of the defendants to work or run omnibuses thereon, or to expend or use any part of the city fund or of any other fund or moneys belonging to the ratepayers of the city in working or running omnibuses thereon or in providing or maintaining omnibuses for such purposes.

By the Leeds Corporation Act, 1908, a tramway route was authorized between Leeds and Horsforth (s. 27). The route was more or less parallel with the omnibus route until the boundary of the city was reached, when it branched off. The tram and omnibus routes ultimately met further on, and both ran together as far as Horsforth. The omnibus route thus was slightly beyond the boundaries of the city before joining the tramway route. This piece was the 40 yards stretch mentioned in para. 7 of the statement of claim. The plaintiff accordingly sought a declaration as above stated, that the defendants were not entitled (*a*) to work or run omnibuses along such parts of Hough Side Road or of Horsforth Lane as lay outside the city boundaries or along any route outside the boundaries except those specified in their Acts of 1905, s. 92, or 1927, s. 101; or (*b*) to expend any part of the city fund for such purposes except as aforesaid; and he claimed an injunction to restrain the defendants, their agents and employees, from running or working omnibuses on the portions of the routes above mentioned, or using the city fund for such purposes.

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The only material part of the defence related to the 40 yards stretch, which the defendants contended (inter alia) came within the principle de minimis non curat lex, but they offered to give an undertaking with regard to the 716 yards not to run omnibuses thereon or use any part of the city fund for such purpose.

H. A. H. Christie for the plaintiff. The only material question is as regards the 40 yards stretch. The defendants have no statutory right to run their omnibuses along this portion of the route; it is ultra vires their powers. The powers of the defendant corporation are contained in their own special Acts. See the Leeds Corporation Act, 1905, ss. 92 and 97; the Leeds Corporation Act, 1908, ss. 27, 28; the Leeds Corporation Act, 1914, s. 19; and the Leeds Corporation Act, 1927, s. 101.

The following cases also bear on the question: *Attorney-General* v. *Manchester Corporation* (1); *Attorney-General* v. *Lord Mayor, etc., of Sheffield* (2); *Attorney-General* v. *Stockton-on-Tees Corporation* (3); and *Attorney-General* v. *West Gloucestershire Water Co.* (4)

C. A. Bennett K.C. and *F. D. Morton K.C.* for the defendants. There is no statutory restriction on the defendant corporation to run their omnibuses over this 40 yards stretch: see *Attorney-General* v. *Wimbledon House Estate Co.* (5); *Attorney-General* v. *London and North Western Rly. Co.* (6); *Attorney-General* v. *Denby* (7); *Attorney-General* v. *Westminster City Council* (8); and *London County Council* v. *Attorney-General.* (9)

H. A. H. Christie in reply. It is submitted that the city fund cannot be charged unless the omnibuses are held to be part of the tramway undertaking: *Attorney-General* v. *London County Council.* (10) The defendants' powers under their own

(1) [1906] 1 Ch. 643, 649, 656.
(2) (1912) 106 L. T. 367.
(3) (1927) 91 J. P. 172; 25 L. G. R. 489.
(4) [1909] 2 Ch. 338.
(5) [1904] 2 Ch. 34.
(6) [1900] 1 Q. B. 78, 87.
(7) [1925] Ch. 596, 600, 608.
(8) [1924] 2 Ch. 416, 419.
(9) [1902] A. C. 165.
(10) [1901] 1 Ch. 781.

Acts do not authorize this. The question is whether the defendants can run omnibuses on two routes in a manner not indicated by Parliament. As to the Court's discretion, see *Attorney-General* v. *Westminster Corporation*. (1) As to the argument from the utility of an unauthorized act, see *Tomkinson* v. *South Eastern Rly. Co.* (2)

LUXMOORE J. This is an action by His Majesty's Attorney-General at and by the relation of one James Irving Stonehouse against the lord mayor, aldermen and citizens of the city of Leeds, whom I shall refer to as the corporation.

The action is brought for a declaration that it is beyond the powers of the corporation to work or run omnibuses, along such parts of Hough Side road or of Horsforth Lane as lie outside the boundaries of the city of Leeds, or along any other route outside the said boundaries, except certain specified routes; or to expend or use any part of the city fund or any other fund belonging to the ratepayers of the said city, in working or running omnibuses along either of the said routes; or along any other route outside the said boundaries (except as aforesaid); or in providing or maintaining omnibuses for such purposes. The plaintiff also asks for an injunction in terms which follow the terms of the declaration. The relator is the president of the Leeds and District Bus Proprietors' Association, and is a ratepayer of the city of Leeds.

The corporation was incorporated by royal charter in the year 1627 in the reign of King Charles I. The fact that it is incorporated by royal charter is of importance, because a corporation so constituted stands on a different footing from a statutory corporation, the difference being that the latter species of corporation can only do such acts as are authorized directly or indirectly by the statute creating it; whereas the former can, speaking generally, do anything that an ordinary individual can do. If, however, the corporation by charter be, as the corporation is in the present case, a municipal corporation, then it is subject to the

(1) [1924] 1 Ch. 437, 454. (2) (1887) 35 Ch. D. 675, 677.

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restriction imposed by the Municipal Corporations Act, 1882, and can be restrained from applying its funds to purposes not authorized by that Act: see *Attorney-General* v. *Manchester Corporation* (1), and the remarks of Farwell J., and *Attorney-General* v. *Newcastle-upon-Tyne Corporation*. (2)

It follows from what I have said that the claim in this action both with regard to the declaration and injunction sought, is necessarily far too wide, for it is not in any circumstances ultra vires the corporation to work or run the omnibuses in question along any route whether within or without the boundaries of the city of Leeds; although it may be ultra vires the corporation to expend any part of the city fund in working or running the omnibuses along particular routes, or in providing or maintaining omnibuses for such a purpose.

Now the Municipal Corporations Act, 1882, s. 140, sub-s. 1, provides: "The borough fund shall be applicable to and charged with the several payments specified in the Fifth Schedule," and by sub-s. 2, "The payments specified in Part I. of that schedule may be made without order of the council; those specified in Part II. may not be made without such order." By sub-s. 3: "No other payment shall be made out of the borough fund, except"—and then follow a number of specified heads, of which the first is admitted to be the only one of importance—namely, "(*a*) under the authority of an Act of Parliament." The fifth schedule enumerates under separate heads the payments which can be made out of the borough fund. Of these it is admitted that the only material head is Part II., No. 11, which comprises "All expenses charged on the borough fund by any Act of Parliament or otherwise by law." In order, therefore, to justify the expenditure of any part of the city fund in working or running the omnibuses or maintaining or providing omnibuses, the corporation must show that the expenses of so doing are charged on the city fund by some Act of Parliament or otherwise by law, or must point to the authority of an Act of Parliament authorizing the payment

(1) [1906] 1 Ch. 643, 651. (2) (1889) 23 Q. B. D. 492; [1892] A. C. 568.

in question. Before considering whether the expenses in question are by any of the methods referred to, in fact charged on the city fund or authorized to be paid out of it, I think it will be convenient to consider the actual matters in respect of which complaint is made, and the material facts relating thereto.

The statement of claim complains of the expenditure of the city fund in providing, maintaining, working and running omnibuses outside the boundaries of the city except over certain excepted routes, but in fact the only routes in respect of which specific complaint is made are two in number. The first of these two routes runs from Aire Street within the city of Leeds to Pudsey along the route denoted in the agreed plan No. 1, by the solid green line, the dotted brown line and the dotted green line. The complaint in this case is in respect of that part of this route extending over a distance of 716 yards which lies outside the city boundary, and is denoted by the dotted green line. I will refer to this 716 yards as "the 716 yards."

The other route runs from Vicar Lane in the city of Leeds to Stanhope Drive, Horsforth, along the route denoted on the agreed plan No. 1 by the solid blue line. The complaint so far as this route is concerned extends only over a distance of 40 yards, which is outside the city boundary, and extends over the point at which the solid blue line crosses the city boundary, denoted on the plan No. 1 by the orange verge line, to the point where it meets the junction of the thoroughfares Hawksworth Road and Low Lane. I will refer to this as "the 40 yards."

The position with regard to the two routes is that the corporation began to run a service of omnibuses over the first mentioned route which includes the 716 yards in July, 1926, and they began to run a service of omnibuses over the second mentioned route including the 40 yards in October, 1927. No question arose with regard to either route until January 17, 1928, when Messrs. Ford & Warren, the relator's solicitors, wrote to the town clerk of the corporation a letter, in which they said: "Our client Mr. J. I. Stonehouse has

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instructed us to draw your attention to the fact that corporation omnibuses are running outside the city boundary on the following routes: On the route from Leeds to Pudsey for a distance of 716 yards within the boundary of Pudsey, and also on the route to and from Horsforth to Leeds. We shall be obliged if you would kindly inform us under what powers, the corporation run these buses outside the city boundaries." The corporation took up the attitude that they were entitled to run the services, and after some correspondence this action was begun on May 10, 1928. The statement of claim was delivered on May 31, 1928; and on June 11, the town clerk wrote to the relator's solicitors a letter in these terms: "It seems to me that it would be regrettable if this action had to be fought out, with consequent expense to the parties. I am authorized on behalf of the defendant corporation to make the following offer: An order to be made, by consent, staying all proceedings on the following terms: (*a*) The corporation gives an undertaking to the court not to work, or run or expend or use any part of the city fund, or any other fund belonging to the ratepayers of the city, in working or running omnibuses along the stretch of road, 716 yards or thereabouts in length, outside the city boundary mentioned in para. 5 of the statement of claim unless and until authorized so to do by Act of Parliament. (*b*) The corporation pays the relator's costs of the action, including the fees payable by the relator to the Attorney-General on the application to commence the action or to sanction this compromise. (*c*) The relator withdraws all objections to the corporation working and running omnibuses along the stretch of road 40 yards in length or thereabouts outside the city boundary mentioned in para. 7 of the statement of claim, whether or not any part of the city fund or of any such other fund as aforesaid, is expended by the corporation in so doing. If the above offer is refused, the corporation will fight the action, so far as regards the 40 yards stretch referred to above, will bring evidence at the trial to disprove para. 8 of the statement of claim, so far as the 40 yards stretch is concerned, and will read this letter to the Court when the question of the

costs of the action comes under discussion." Para. 8 of the statement of claim is a statement that the defendants had expended and were continuing to expend part of the city fund in providing and maintaining omnibuses over the route which included the 40 yards stretch.

That letter was answered on June 12 by Messrs Ford & Warren in a letter in which they say: "We understand the last paragraph to mean that if a settlement is not come to upon the terms set out therein, the corporation will admit the claim in respect of the 716 yards referred to in para. 5 of the statement of claim; and will defend the action in respect of 40 yards referred to in para. 7 of the statement of claim. Are we correct in this? We have seen Mr. Stonehouse upon your letter. He is unable to consider your suggestion for a compromise until he knows what the corporation's contention is with regard to the 40 yards referred to in para. 7 of the statement of claim, and we were unable to inform him. We should feel obliged if you would kindly inform us in what respect the corporation's right to run over the 40 yards differs from their right with regard to the 716 yards which they admit they have no right to run over, or to expend the ratepayers' money in running over. At the same time would you also inform us on what grounds the corporation deny that they are not expending the moneys as alleged in para. 8 of the statement of claim." On June 19 that letter was answered by the town clerk by a letter in which he says: "If a settlement of this action is not arrived at, it is the present intention of the defendants to repeat in their defence their offer of an undertaking in the terms set out in para. (*a*) of my letter to you of 11th inst. and to contest the rest of the action. But if the offer of a settlement is refused, the defendants will, of course, be guided by counsel as to the precise form of the defence. And neither the undertaking above referred to nor my letter of 11th inst. is an admission that the corporation had no right to run omnibuses over the 716 yards stretch. You will appreciate that there is a substantial difference between the two statements, 'We are content to cease to run omnibuses over the 716 yards

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stretch,' and 'We admit that we never had any right to run omnibuses over the 716 yards stretch.' With regard to the 40 yards stretch referred to in para. 7 of the statement of claim, I should have thought that my letter of 11th inst. gave your client sufficient information to enable him to make up his mind whether he will accept or reject the defendants' offer of a settlement. However, I have no objection to informing you (*a*) that the defendants will bring evidence at the trial to show that the running of omnibuses over the 40 yards stretch has caused no expense to the city fund, but has, on the contrary, resulted in an increase in that fund; and (*b*) that the defendants will contend at the trial that, even if they exceeded their powers in running omnibuses over the 40 yards stretch, the case is one in which the court should apply the maxim de minimis non curat lex and should refuse an injunction."

That letter was answered on June 28 by Messrs. Ford & Warren, who say: "The relator is unable to accept the proposals for settlement therein contained. He attaches considerable importance to the principle involved in the proceedings—namely, the corporation running omnibuses ultra vires of their statutory powers—and we would further point out that no undertaking is offered that the corporation will in future not run omnibuses over unauthorised routes outside the city."

On October 15 the corporation put in its defence to this action, and in para. 2 they say: "The defendants admit that from the month of July, 1926, until July 25, 1928, the route followed by their omnibuses engaged in the service mentioned in para. 4 of the statement of claim"—that is the first mentioned route—"passes along Hough Side road in the borough of Pudsey and for a distance of 716 yards or thereabouts was outside the boundaries of the city of Leeds. As from July 25, 1928, the omnibuses of the defendants engaged in the said service have followed an alternative route which lies wholly within the boundaries of the said city." In para. 6 of the defence the corporation admit that they have not been authorized to construct any tramways along the 716 yards or along the 40 yards.

The position, therefore, after the defence was delivered was that the corporation admitted that it had no power to expend any part of the city fund in working or running omnibuses over and along the 716 yards; so that the only question which arises in the action with regard to this part of the case is as to the form of relief to which the plaintiff is entitled in respect of the 716 yards and the costs.

With regard to the 40 yards the position is different. It is admitted that the expenses incurred by the corporation from October, 1927, up to January 29, 1929, in running omnibuses over the second mentioned route, including the 40 yards, have substantially exceeded the receipts of the same route during the same period, and that such excess has been paid out of the city fund. This is shown by a letter from the town clerk to the relator's solicitors of January 29, 1929.

The corporation's contention with regard to the 40 yards —the plaintiff has not in fact challenged the expenditure on the rest of the route, which extends for a total distance of 5 miles 3 furlongs and 161 yards—is that it is not ultra vires to make an expenditure from the city fund for the purpose of working and running omnibuses over this 40 yards, because such working and running is for a purpose incidental to the purposes of the tramway undertaking of the corporation, of which the omnibus services form a part; and that the expenditure is in fact authorized by Act of Parliament. It must be remembered that there is nothing ultra vires in the actual running and working of the omnibuses, but in order to justify the expenditure of the city fund the corporation must point to statutory authority to do so. The corporation seeks to justify the expenditure in this way.

By the Leeds Corporation (Consolidation) Act, 1905, s. 92, it is enacted that the corporation may provide, maintain, work and run omnibuses .... (*a*) within the city; (*b*) without the city. The working and running of omnibuses within the city is strictly limited to working and running in connection with the city tramways for any of the purposes named in the sub-section. Sect. 92 is as follows: ." The corporation

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may provide maintain work and run omnibuses . . . . (*a*) within the city in connection with the corporation tramways when the running of carriages thereon is impracticable or during the construction reconstruction alteration or repair thereof or in extension of any such tramways and also for testing the amount of traffic along any route or between any particular points." In other words, the omnibus services are not to compete with the tramways within the city, but are to be ancillary to such tramways. But the working and running of omnibuses outside the city is not so limited. Sub-s. (*b*) provides that the corporation may work, maintain and run omnibuses " beyond the city along the route of any tramways which the corporation have been or shall be authorised to construct . . . .," and two routes are specifically mentioned. The omnibuses may be worked and run along the route of any tramways which the corporation have been or shall be authorized to construct and along two specified routes. The side note to the whole section is " Omnibuses in connection with tramways."

In 1905, when the Leeds Corporation (Consolidation) Act was passed, the tramway route to Horsforth, which is shown by the solid red and dotted red lines on the agreed plan No. 1, had not been authorized. It was, in fact, authorized by the Leeds Corporation Act, 1908, s. 27. It is the tramway which is there referred to as Tramway No. 2. The material part of this tramway, so far as this case is concerned, is the portion shown on the agreed plan No. 1 by the dotted red line, where it runs side by side with the solid blue line; the position being that the part of the omnibus route denoted by the solid blue line after it leaves the city boundary and at the junction with the western side of the 40 yards route, runs along the tramway route No. 2 authorized by the Act of 1908.

Now, the position under the Act of 1905, s. 92, appears to me to be this: Once you find authority to run and work omnibuses outside the city boundary, the corporation may run their omnibuses without restriction. They have even the choice of operating the authorized route by trams or

omnibuses. This being so, the real point in the case, so far as the 40 yards is concerned, seems to be this: Is the corporation authorized to spend moneys out of the city fund in connecting an authorized route of omnibuses outside the city with a route of omnibuses within the city?

The service of omnibuses along the route of a tramway outside the city, which the corporation is authorized to construct, is a part of their tramway undertaking. This is shown in the following way: The Act of 1905 contains in s. 4 certain definitions. The material definitions are as follows: "'The authorised tramways' means the tramways authorized to be constructed by the corporation at the passing of this Act but the construction of which has not been completed." "'The corporation tramways' means any tramways belonging to demised to or worked by or authorised to be constructed by the corporation and whether within or beyond the city." Those two definitions obviously refer only to the tracks or routes of the tramsways and nothing else. The next definition is a definition of "The Tramways' Undertaking." It is as follows: "'The Tramways Undertaking' includes the corporation tramways and also all lands, buildings stations machinery appliances apparatus rights powers and privileges for the time being belonging to the corporation or held or used or enjoyed by them for or in relation to or in connection with the corporation tramways." That definition includes not only the tracks themselves, but the materials, the machinery, appliances, and apparatus, "for the time being belonging to the corporation." It is to be observed that tramcars or omnibuses are not specifically mentioned, but I think, having regard to the provisions of s. 92, they must be included in "machinery, appliances and apparatus." Then s. 77 of the Act authorizes the provision of carriages, and, I think, these would include the omnibuses which would be required for the tramway undertaking. Sect. 92 I have already referred to, because that is the section which gives the corporation power to work and run the omnibuses. Sect. 97 provides that "all the interest on any principal moneys borrowed by the corporation and applied

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by them for the purposes of the tramways undertaking and all other the costs charges and expenses of and incident thereto on revenue account "—that is of and incident to the tramways undertaking—" shall be paid and satisfied out of the city fund . . . . , and the corporation shall keep as part of their accounts a separate account as is in this Act hereinafter provided." Sect. 337 provides : "The corporation shall keep their accounts so as to show under a separate heading or division in respect of each of the following undertakings " —then a number of undertakings are mentioned, which include the tramways—and " on the one side all receipts in respect of the particular undertaking, and on the other all expenses in respect of the same undertaking," such expenses being divided so as to also show in each case the amounts expended in respect of each of the " certain specified purposes."

Sect. 77, to which I have already referred, authorizes the taking of tolls and charges in respect of the corporation tramways, and s. 92 authorizes the taking of fares and charges for the use of the omnibuses. Unless these are both receipts from the tramway undertaking, there is no provision for their inclusion in any of the accounts under s. 337. In my judgment it is plain from the Act, that the omnibuses must be provided out of the city fund for there is no other fund mentioned or available, and this applies also to the cost of working and running the omnibuses.

Now, by the Leeds Corporation Act, 1914, s. 19, sub-s. 1, it is provided that : " The corporation may provide and maintain, but shall not manufacture omnibuses and may run the same within the city demanding and taking reasonable fares and charges for the conveyance of passengers therein not exceeding the fares authorized by sub-section (9.) of this section." Sub-s. 9 provides that : " The undertaking authorised by this section "—that is the running of omnibuses within the city—" shall be deemed to form part of the tramways undertaking of the corporation "—and then it provides that the provisions of the Leeds Corporation (Consolidation) Act, 1905—" shall extend and apply to and for the purposes of this section as if those provisions were

with all necessary modifications re-enacted in this part of this Act. Provided that in the application of such provisions the same shall be read and have effect as if omnibuses were carriages used on the corporation tramways."

After this Act was passed the corporation was authorized to provide, maintain and run omnibuses: (1.) anywhere within the city boundary, and (2.) outside the city boundary, along the route of any tramway which the corporation has been or shall be authorized to construct.

The corporation is authorized to apply the city fund in discharging the expenses of and incident to the tramways undertaking. That is provided by the Leeds Corporation (Consolidation) Act, 1905, s. 97, to which I have already referred. To connect the two routes where they meet is, in my opinion, an expense of and incident to the undertaking. If the plaintiff is right in his contention that there is no power to expend any part of the city fund in respect of the 40 yards, the position would be this: The corporation could expend the city fund on working and running the omnibuses up to the city boundary; they could spend part of the city fund on working and running the omnibuses outside the city boundary, along the authorized tramway route from the point where the 40 yards ends; the corporation could, if its garage was without the city boundary, obviously run the omnibuses over the 40 yards either for the purpose of starting the service within the boundary from the eastern end of the 40 yards, or, if its garage was within the city, it could equally run its omnibuses over the 40 yards for the purpose of starting the service outside the boundary from the western end of the 40 yards. It could also run the omnibuses over the 40 yards and back, in order to turn them at the city boundary for the purposes of the return journey within the city. It has been established in evidence before me that it is wholly impracticable to turn an omnibus for the return journey, except by passing over the 40 yards and turning at the Bridge Inn; because Horsforth Lane is only some 19 feet to 20 feet wide for a considerable distance within the city boundary at that point at which it joins the 40 yards.

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The expense of making the passage over the 40 yards for any of these purposes would obviously be an expense incident to the tramways undertaking of the corporation (which, in my opinion, includes the omnibus services), and consequently it is authorized to be met out of the city fund.

In considering the question whether a particular matter is ultra vires you must approach it from a reasonable point of view, and in this connection I would refer to a passage which occurs in the speech of Lord Selborne L.C. in the case of the *Attorney-General* v. *Great Eastern Ry. Co.* (1): "I assume that your Lordships will not now recede from anything that was determined in the *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (2) It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

In my opinion the expenditure of part of the city fund in working and running the omnibuses over the 40 yards connecting the two services, each of which is a branch of the corporation tramways undertaking, can properly be regarded as incidental to that which the Legislature has authorized in the Acts already referred to, and is not ultra vires. The action therefore fails so far as the 40 yards is concerned.

The question was raised whether the Court ought, assuming the plaintiff was right in his contention as to the 40 yards, to grant any injunction. In view of my decision, this point does not arise, and I do not propose to say anything about it. In my judgment the plaintiff is entitled to a declaration as to the 716 yards, but not in the form asked. I think the declaration should be that it is beyond the powers of the defendant corporation to expend or use any part of the city fund, or any other fund belonging to the ratepayers of the

(1) (1880) 5 App. Cas. 473, 478. (2) (1875) L. R. 7 H. L. 653.

said city in working or running omnibuses along the 716 yards, unless and until authorized by Act of Parliament to do so.

The corporation has offered an undertaking with regard to this 716 yards, which, I think, goes further than the declaration to which in my opinion the plaintiff is entitled. I understand they are willing to give an undertaking in the terms at any rate of the declaration. In the circumstances I do not think it will be necessary to grant any injunction.

The result is that the plaintiff has succeeded as to one part of the action and failed as to the other. The main costs at the trial were incurred in connection with the 40 yards. In view of the form of the defendants' letter, and the fact that they did not make an unconditional offer so far as the 716 yards was concerned, I think the proper course will be to make no order as to costs and leave each party to bear its own costs of the action.

Solicitors: *Swepstone, Stone, Barber & Ellis, for Ford & Warren, Leeds; King, Wigg & Brightman, for Thos. Thornton Leeds.*

A. R. T.

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ASTBURY J.

March 15, 19, 20, 22.

C. A.

May 29, 30; June 12.

THOMPSON *v.* WARNER BROS. PICTURES, LIMITED.

[1928. T. 1853.]

Copyright in Song—Pre-Act Assignment—Mechanical recording Rights subsequently conferred by Act—Statutory Reservation from pre-Act Assignment—Ambit of Reservation—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 7; *s.* 19, *sub-ss.* 1, 7 (*c*).

On April 3, 1911, the author of a song assigned the copyright to certain assignees.

On December 16, 1911, the Copyright Act, 1911, was passed, and on July 1, 1912, it came into operation.

Sect. 1, sub-s. 2, gave the author (inter alia) the sole right to make records by means of which the work might be mechanically performed, and s. 19, sub-s. 1, created copyright in those records.

Sect. 7 provided that all infringing copies should be the property of the copyright owner.

Sect. 19, sub-s. 7 (*c*), provided that notwithstanding any pre-Act assignment "any rights conferred by this Act in respect of the making" of records should belong to the author and not to the assignee.

A record made in America without the author's licence, and imported here without his licence, reproduced (inter alia) part of the song.

On November 29, 1928, the defendants, notwithstanding the author's previous remonstrance, used this record for performing the song (inter alia) in public.

On the author suing for an injunction, delivery up, and damages, the defendants took the point that, having regard to the pre-Act assignment, the author had no right to sue:—

Held, by Astbury J., that the author was entitled to sue on two grounds—namely:—

(*a*) The rights reserved to the author by s. 19, sub-s. 7 (*c*), included not merely the sole right to make the record but also the sole right to use it for the performance of the song in public.

(*b*) As the sole right of "making" the record was admittedly reserved to the author, the record in question was an infringing record in this country and therefore belonged to the author under s. 7. Consequently the defendants had no right to retain or use it without his licence.

Held, by the Court of Appeal (reversing the decision of Astbury J.), (1.) that s. 19, sub-s. 7 (*c*), only reserved to the author the sole right to make or authorize the making of the record and not the sole right to use it for performance in public; (2.) that the second ground of Astbury J.'s decision was on a point not open to the plaintiff on the pleadings.

WITNESS ACTION.

This was an action for infringement of copyright. The plaintiff, a music hall comedian whose professional name was Billy Merson, was the author of a song called "The Spaniard

that blighted my life." The song was written in 1910 and produced by the plaintiff in 1911, before the Copyright Act, 1911, was passed, and on April 3 he was the owner of the copyright under the old law. The Copyright Act, 1911, was passed on December 16, 1911, and came into operation on July 1, 1912.

On April 3, 1911, the plaintiff signed the following memorandum in his professional name: "Memorandum that I Billy Merson have this 3rd day of April 1911 in consideration of payment to me by them of the sum of 12*l.* (receipt of which is hereby acknowledged) sold and assigned to Messrs. Francis Day & Hunter, of . . . . London W.C. the whole of the property, copyright and interest, present and future, vested and contingent, for this and all other countries of and in the songs entitled 'It's going to be a serious thing for England' and 'The Spaniard that blighted my life' together with the sole right of representing or performing the same, or of causing or permitting it to be represented or performed except at Music Halls.

And I hereby covenant to do or cause to be done all such further acts and assurances as may at any future time be by the said Messrs. Francis Day & Hunter deemed advisable or necessary to secure and uphold their sole enjoyment of all the property, copyright, performing rights and interest aforesaid.

And I hereby certify that the transaction . . . . does not form part of a larger transaction . . . . of which . . . . the consideration exceeds 500*l.*

As witness my signature hereunto,

Billy Merson.

Theatre fees equally div.
B. M.
F. D. & H."

The defendants Hyde Park Cinemas, Ld., were the lessees of the Regal Cinema, London, which on the evidence the Court held not to be a music hall within the above memorandum.

The defendants Warner Bros. Pictures, Ld., were the

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owners lessees or licensees of a talking singing and musical cinematograph film called "The Singing Fool," consisting of a cinematograph picture film and a gramophone record combined and synchronized.

This film, which was made in America without the plaintiff's licence, and imported here without his licence, reproduced, among many other items, the first verse and chorus of the plaintiff's song, as sung by Al Jolson with the accompaniment orchestrated.

On November 29, 1928, notwithstanding the plaintiff's previous remonstrance, the defendants, who bona fide believed they had an effective licence from Francis Day & Hunter, Ld., who they thought were the plaintiff's agents, produced the film at the Regal Cinema.

On November 30, 1928, the plaintiff commenced this action for an injunction, delivery up, and damages.

In addition to relying on their licence, a point which failed on the evidence, the defendants relied on the memorandum of April 3, 1911, as an assignment of the plaintiff's copyright, including performing rights of any kind, to Francis Day & Hunter, and submitted that the plaintiff had no right to sue.

Archer K.C. and *Mulligan* for the plaintiff. The only real issue is whether, having regard to the pre-Act assignment of April 3, 1911, the plaintiff has any right to sue.

Now under s. 19, sub-s. 7 (*c*), the author, notwithstanding the assignment, retains "any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed."

These rights are conferred by s. 1, sub-s. 2, and include the sole right to perform the work in public, and (*d*) to make any record or other contrivance for mechanical performance and to authorize any such acts. These rights must surely include an inherent right to use and authorize the user of the record by way of mechanical performance.

There is no express decision on the point, but the remarks of Buckley L.J. in *Monckton* v. *Pathé Frères*

Pathephone, Ld. (1), to the effect that the right to make a record includes the right to sell it when made and to authorize its use by way of performance are very much in our favour.

Again, *Chappell & Co.* v. *Columbia Graphophone Co.* (2) was decided on the footing that the plaintiffs, the pre-Act assignees, had no copyright in the mechanical rights. They only succeeded because the defendants, as a preliminary to making their record, had made an infringing copy of the plaintiffs' music.

There is one further point. In this country the record itself is an infringing copy of the plaintiff's song, and therefore belongs to the plaintiff under s. 7. That is so even if, as the defendants say, the reservation in s. 19, sub-s. 7 (*c*), is confined to the making rights. The defendants therefore cannot retain or use the infringing record without the plaintiff's permission.

Moritz K.C. and *K. E. Shelley* for the defendants. The better opinion under the old law was that a copyright owner could restrain a public mechanical performance of his work, though not a private performance, but there are only dicta to this effect: *Boosey* v. *Whight* (3); Copinger on Copyright, 6th ed., p. 226.

We will, however, assume that the assignment merely passed the right to perform the song by voice or musical instrument. Immediately, therefore, before the Act the copyright and the only performing rights then known to the law were vested in the assignees. These were "the existing rights" at that date. As from the passing of the Act, however, the assignees became entitled under s. 24 to the "substituted rights" given by Sch. I.—namely, in this case, "Copyright as defined by this Act." That refers to s. 1, sub-s. 2, which includes a right to perform, and by s. 35 "Performance" means any acoustic representation of a work, and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument. The full right to perform

(1) [1914] 1 K. B. 395, 403. (2) [1914] 2 Ch. 745, 751, 755.
(3) [1900] 1 Ch. 122, 123, 125.

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by any means whatever passed therefore to the assignees, under whose licence we have performed.

We have not made the mechanical contrivance, nor do we claim to do so. That right was no doubt reserved to the plaintiff by s. 19, sub-s. 7 (*c*). But that is the extent of his right. The performing rights are wholly vested in the assignees, and the plaintiff has no right to sue on them. He could not even sanction the use of the record for a performance without his assignees' permission.

Buckley L.J.'s observations in *Monckton's* case (1) were purely obiter, as it was admitted on all sides that the sale of post-Act records would be an infringement. (2)

The point on s. 7 is not raised by the pleadings. We are only sued for performing.

Archer K.C. in reply. The performing rights to be created by the Act were not specifically assigned to the assignees. In that case s. 24, sub-s. 1, and Sch. I. might have applied. This assignment is in general terms, and s. 19, sub-s. 7 (*c*), clearly applies: see Copinger on Copyright, 6th ed., p. 239.

The assignees do not claim the mechanical rights, and if, on construction, the memorandum had the effect of passing them it would at once be rectified.

Sect. 35 only defines "Performance." It has nothing to do with performing rights. The point on s. 7 is quite sufficiently raised in the statement of claim. The performance consists in using a record belonging to the plaintiff.

Mulligan. May I add one further point? The memorandum has throughout been treated as a valid written assignment. It is in fact only a memorandum of an oral assignment. That is wholly insufficient for an assignment of copyright, which must be in writing: *Shepherd* v. *Conquest.* (3) The so-called assignment was therefore wholly inoperative.

ASTBURY J. [after stating the facts:] The memorandum of April 3, 1911, is not referred to in the statement of claim at all, and I think there can be no reasonable doubt that if

(1) [1914] 1 K. B. 403. (2) [1914] 1 K. B. 399, 407.
(3) (1856) 17 C. B. 428.

it had not been for the 1911 Act passed on December 16, 1911, and coming into operation on July 1, 1912, the plaintiff would have had no sort of title to sue the defendants, and that Francis Day & Hunter would have been the owners of this copyright subject to such other arrangements as to royalties and provisional royalties, etc., as they might have made with the plaintiff.

The Act, however, introduced so-called "mechanical rights" into the region of copyright.

Sect. 1, sub-s. 2, provides that for the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; and, if the work is unpublished, to publish it; and shall include (inter alia) the sole right—(*d*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorize any such acts as aforesaid.

The portion dealing with mechanical contrivance is new.

Sect. 2, sub-s. 2, provides that copyright in a work shall also be deemed to be infringed by any person who—

(*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or

(*b*) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(*c*) by way of trade exhibits in public; or

(*d*) imports for sale or hire into any part of His Majesty's dominions to which this Act extends, any work which to his knowledge infringes copyright. . . . .

So that there is no question now that the author of a musical work made or published after the date of the Act has not only the sole right to produce or reproduce the work or any substantial part thereof and to perform it, but also the right to produce it in the form of a record, perforated

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roll, or other contrivance by which the work may be mechanically performed and to perform it by any such means and to authorize any such acts.

With regard, however, to a work which became the subject of copyright before the Act, the provisions of the Act are somewhat difficult to construe.

Sect. 19, sub-s. 1, provides that copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works. . . . .

Sub-s. 7, which deals with a matter directly in issue in this case, provides that in the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions. I need not discuss "the foregoing provisions," because it is only cl. (*c*) that is important.

Clause (*c*) provides that notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, "any rights conferred by this Act in respect of the making, or authorising the making," of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the royalties aforesaid—that is the mechanical royalties—shall be payable to, and for the benefit of, the author of the work or his legal personal representatives.

It is upon cl. (*c*) that the greater part of the argument has turned.

The defendants contend that it only reserves to the author who has assigned his copyright before the Act the rights conferred by the Act in respect of the making or authorizing the making of contrivances by means of which the work may be mechanically performed ; and that cl. (*c*) read with the rest of the Act does not, as against the assignee, reserve to the author the right of performing the work in public by means of the mechanical contrivance.

The plaintiff, on the other hand, contends that cl. (*c*) reserves to the author of a pre-Act copyright assigned before the Act

the full statutory rights in respect of the mechanical rights introduced by the Act. In other words, he contends that it not only reserves the right to "make or authorise the making" of the mechanical contrivance but the right to use it, or authorize its use irrespective of the assignee's rights in the copyright of the work itself.

This question is not, as far as I can ascertain, the subject of any express decision, and it seems to me that there is a great deal to be said for either view.

The two main issues that I have to determine are: (1.) Whether the Regal Cinema is a music hall within the agreement of April 3, 1911, and, if not, (2.) whether s. 19, sub-s. 7 (*c*), has reserved to the plaintiff, as against his assignees, not merely the right to "make or authorise the making" of mechanical contrivances by means of which this song may be mechanically performed but the right to use and authorize the use of such contrivances for the mechanical performance of the song in public.

With regard to the first issue evidence has been called and it is a question of fact whether the Regal Cinema is a music hall within the agreement. [After dealing with this question and holding that the Regal Cinema was not a music hall within the agreement, his Lordship continued:]

The real issue therefore is the second—namely, what rights in connection with mechanical contrivances by which his song could be performed were reserved to the plaintiff by s. 19, sub-s. 7 (*c*), notwithstanding the assignment recorded in the memorandum of April 3, 1911.

Sect. 7 provides that all infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

There is no question between the parties that the right to make and authorize the making of that part of this film contrivance by means of which part of the plaintiff's song

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is mechanically performed was reserved to the plaintiff by s. 19, sub-s. 7 (*c*).

The plaintiff himself, whatever his assignees or apparent agents may have done, has not authorized the importation into this country of that part of the apparatus, and the apparatus therefore so far as it includes this particular portion is a pirating or infringing apparatus.

Prima facie a person in possession of an infringing article is ipso facto in the wrong. Not only may he not retain possession of it, but a fortiori he may not use it for his own purposes either publicly or otherwise.

The defendants contend that the plaintiff assigned his copyright present and future, together with the sole right of performing or causing or permitting the song to be represented or performed except at music halls, to Francis Day & Hunter. They say they have performed the song in public by means of their mechanical contrivance, and that notwithstanding s. 19, sub-s. 7 (*c*), the right to perform or authorize the performance is vested in Francis Day & Hunter, and not in the plaintiff.

I have come to the conclusion that this contention is ill founded.

I have great sympathy with the defendants. The plaintiff not only assigned his copyright present and future to Francis Day & Hunter, but according to the evidence he authorized them to make arrangements for the performance of the song in two respects. One was as to the inclusion of the song in pantomimes. That was controlled under the arrangement by Francis Day & Hunter, but only on the terms that the royalties should be divided between them and the plaintiff.

Again when gramophone records became important Francis Day & Hunter recognized that the plaintiff was the sole copyright owner of mechanical contrivances in respect of the song. He was plainly the owner under the Act, and, after that position was appreciated, the plaintiff authorized Francis Day & Hunter, who had greater facilities for that purpose, to make all arrangements for him with regard to the making

and sale of gramophone records. This they did on the terms that the plaintiff, as owner of the copyright in the mechanical contrivances, should receive 75 per cent. of the royalties, and they should retain the remaining 25 per cent. for their work in this connection. The defendants were undoubtedly led to believe, though not by any action for which the plaintiff was directly responsible, that Francis Day & Hunter controlled the plaintiff's copyright in the mechanical contrivances, as distinct from and in addition to their own copyright in the song itself. The plaintiff, however, gave no authority to his assignees to make any such representation, if indeed they made it. He never passed his rights in the mechanical part of his copyright to those assignees. All he did was to employ them as agents in respect of the making and sale of gramophone records. But I have a great deal of sympathy with the defendants, because they ascertained that the plaintiff had agents in America and in this country, and they thought they had obtained the permission of those agents to include this verse of the song in their film, though I am not satisfied that the agents actually ever gave any such permission, and it is apparent that if they gave permission, they had no authority to do so. In other words, there is no evidence that the plaintiff ever authorized any such dealing with his mechanical rights as to enable the defendants to set up a licence binding him.

It remains only to determine whether " the rights conferred by the Act in respect of the making and authorizing the making of contrivances by means of which the work may be mechanically performed " include the rights to perform and authorize the performance by mechanism notwithstanding the pre-Act assignment.

Now s. 19, sub-s. 7 (*c*), does not limit the rights reserved to the author to the making and authorizing the making of the contrivance. It reserves to him the rights conferred by the Act "in respect of" the making and authorizing the making.

Having regard to s. 1, sub-s. 2, those reserved rights seem to me to include the user and the right to authorize the user of the mechanical contrivance.

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Although there is no direct authority upon the point, certain remarks of Buckley L.J. in *Monckton's* case (1) are of great assistance. He says: "On July 1, 1912, when the Act came into force, the plaintiff was a person entitled to the musical copyright in his musical work, and he then became, by virtue of s. 24, sub-s. 1, and the First Schedule to the Act, entitled to copyright in his work 'as defined by this Act.' Such copyright included, by virtue of s. 1, sub-s. 2, the right to reproduce the work in any material form (including therefore such a record as is here in question), and included the sole right to make any such record: s. 1, sub-s. 2 (*d*). It will be noticed that making and not sale is the thing to which, by virtue of that section, the sole right is so far given to the plaintiff. This right the defendants have not infringed." Then there is this important passage: "But further, under s. 1, sub-s. 2, copyright includes the sole right to authorise the performance of the work. The seller of a record authorises, I conceive, the use of the record, and such user will be a performance of the musical work. This consideration seems to show that sub-s. 2 itself is not confined to making but extends to sale."

In that case, of course, there was no question of any pre-Act assignment, but where the Act has now separated the copyright rights assigned before the Act and the copyright rights given or reserved to the author after the Act, I have come to the conclusion that the right to make and authorize the making of the record carries the right to use and authorize the use of the record when made and the performance of the work by using that record.

If this is right, the defendants have used an infringing apparatus. They have used it in a way that the plaintiff, the owner of the copyright in the mechanical contrivance, has not authorized, and therefore the plaintiff is entitled to succeed.

G. R. A.

C. A. The defendants appealed. The appeal was heard on May 29, 30, 1929.

No argument is set out in regard to the question whether the record used by the defendants was imported into England

(1) [1914] 1 K. B. 395, 403.

in contravention of s. 2, sub-s. 2, of the Copyright Act, 1911, and must therefore under s. 7 be deemed the plaintiff's property, as the Court held that the point was not open to the plaintiff on the pleadings.

Moritz K.C. and *K. E. Shelley* for the appellants. In *Boosey* v. *Whight* (1) it was held that the making of gramophone records was not an infringement of copyright. The Copyright Act, 1911, was passed to remedy this, and s. 1, sub-s. 2 (*d*), defines copyright as including the sole right in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered, and to authorize any such acts as aforesaid. Sect. 2 defines infringement. Sect. 35 defines "performance" as "including . . . . a representation made by means of any mechanical instrument." Sect. 19 deals with the new mechanical rights, and in sub-s. 1 creates a copyright in the records or mechanical contrivances themselves. Sect. 19, sub-s. 7 (*c*), reserves to the author notwithstanding any pre-Act assignment of copyright "any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed." The effect of this is that, notwithstanding the assignment to Francis Day & Hunter, Ld., this copyright belongs to the plaintiff. But Astbury J. was wrong in holding that this extended to include copyright in the public performance of any mechanical contrivance. The performing rights passed to Francis Day & Hunter by the assignment, and there is nothing in sub-s. 7 (*c*) to alter this as regards performance by means of a mechanical contrivance. This is made clear by s. 24 and the First Schedule, which vests in the assignees "copyright as defined by this Act" subject to the provisions in s. 19, sub-s. 7 (*c*). What the sub-section reserves to the author is the new right mentioned in s. 1, sub-s. 2 (*d*), and not the right of public performance. Astbury J. relied on a dictum of Buckley L.J.

(1) [1900] 1 Ch. 122.

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in *Monckton* v. *Pathé Frères Pathephone, Ld.* (1), but in that case the copyright was not split up and the observations there can have no bearing on a case where it is. Sect. 1, sub-s. 2, divides copyright into two parts: (1.) the sole right to produce or reproduce the work, and (2.) the sole right to perform the work in public. Sect. 1, sub-s. 2 (*d*), relates to the first of these (the producing rights) as regards mechanical contrivances, and it is these only that are reserved to the author by s. 19, sub-s. 7 (*c*), as is shown by the vital words of that sub-section "making, or authorising the making." There is no ground for extending the right so reserved by implication.

Archer K.C. and *Mulligan* for the respondent. It is not a reasonable construction of s. 19, sub-s. 7 (*c*), to exclude from it the right to control the user of mechanical contrivances. It is not really a question of performance but of user. No aid can be obtained from s. 24 or the First Schedule in determining what is reserved by s. 19, sub-s. 7 (*c*). By s. 31 all copyright except under the Act was abolished, and the sole object of s. 24 and the First Schedule was to convert pre-Act copyrights into copyrights under the Act. The rights reserved by s. 19, sub-s. 7 (*c*), are those created by s. 1, sub-s. 2 (*d*).

[LORD HANWORTH M.R. The performing rights were not conferred by s. 1, sub-s. 2 (*d*), but by the earlier part of sub-s. 2.]

Sect. 1, sub-s. 2 (*d*), must be read into the earlier substantive part of the sub-section. In *Chappell & Co., Ld.* v. *Columbia Graphophone Co.* (2) a single copy of a song had been made for the purpose of making an orchestral accompaniment to be used for making a graphophone disc. The pre-Act assignees of the copyright were held to be entitled to prevent it, but Swinfen Eady L.J. makes it clear that this is only because a copy of the song was made. Otherwise the author only could have complained.

[LAWRENCE L.J. Public performing rights were not there in question.]

(1) [1914] 1 K. B. 395, 403, 405. (2) [1914] 2 Ch. 745, 755.

It is not a question of performing rights when dealing with a record but of using the record, and in the Copyright Act, 1911, no distinction is made between private and public user. The effect of s. 19, sub-s. 7 (*c*), is to reserve to the author the right of making and exploiting in any way mechanical contrivances.

[RUSSELL L.J. *Boosey* v. *Whight* (1) shows that the right to stop a mechanical performance in public was in the general assignees.]

That was under the old law, which was abrogated by s. 31. The Act of 1911 confers on an author the power to prevent the coming into existence of a mechanical contrivance, and that must include the right to control the user of this contrivance: see *Monckton* v. *Pathé Frères Pathephone, Ld.* (2)

Moritz K.C. replied.

Cur. adv. vult.

June 12. LORD HANWORTH M.R. This is an appeal from a judgment of Astbury J. dated March 22, 1929.

The plaintiff is a music hall comedian whose stage name is "Billy Merson," and he sues the defendants in respect of a talking film displayed at the cinema of the second defendants, asking for an injunction to restrain the infringement by the performance, as a part of the film, of a song which he composed early in 1911 before the Copyright Act of that year was passed or came into force.

The defendant company, Hyde Park Cinemas, Ld., are lessees of a music hall known as The Regal situate at Marble Arch, in the county of London. The defendant company, Warner Brothers Pictures, Ld., are the owners, lessees or licensees of a talking, singing and musical cinematograph film called "The Singing Fool," which is the peccant film.

Astbury J. granted an injunction restraining the defendants and their respective directors from producing, reproducing, performing or publishing, and from permitting to be produced, reproduced, performed or published in The Regal Cinema, or

(1) [1900] 1 Ch. 122. (2) [1914] 1 K. B. 395, 403, 405.

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elsewhere, the plaintiff's song: "The Spaniard that blighted my life," by means of any record or other contrivance in the possession or control of the defendants or either of them, and from doing any other act or thing to infringe or injure the plaintiff's copyright. He gave also the usual consequential relief.

By an agreement dated April 3, 1911, made between the plaintiff and Francis Day & Hunter, Ld., the plaintiff sold and assigned to the company "the whole of the property, copyright and interest, present and future, vested and contingent, for this and all other countries of and in the songs entitled 'It's going to be a serious thing for England,' and 'The Spaniard that blighted my life,' together with the sole right of representing or performing the same, or of causing or permitting it to be represented or performed except at music halls," and the agreement also contained a covenant for further assurance.

The second song above mentioned was incorporated into a talking, singing and musical cinematograph film called "The Singing Fool." This film was made and produced in America.

On November 8, 1928, a comprehensive licence was granted by a number of firms and companies as licensors, among which were Francis Day & Hunter, Ld., to The Western Electric Company, Ld., for a term which includes the relevant dates in the present case, to import films or records recording or reproducing musical works, the copyright in which in Great Britain "is or becomes during the said period vested in or controlled by the licensors and to make copies of films and records so imported for the purpose only of use in contrivances supplied by the licensees for the reproduction of sounds with or without pictures by the use of films and/or records, and to use or exhibit the same" in a number of theatres named in the schedule, one of which was The Regal, London.

Pursuant to this licence the singing and musical film was imported into this country and was used at The Regal Cinema by the defendants.

Complaint was made by the plaintiff to the defendants of the intention to use the film at The Regal Cinema. The plaintiff claimed that he was the owner of the rights of performing his song, and as the defendants declined to withdraw it from the film, he issued his writ in this action on November 30, 1928.

The defendants admit that the second defendants have performed the first verse and chorus of the song above mentioned by means of a cinematograph film at dates subsequent to the issue of the writ, but they rely upon the licence granted to them by Francis Day & Hunter, Ld.

The learned judge has held that The Regal Cinema is not a music hall, and that the user of the film at The Regal was not within the exception reserved expressly to the plaintiff by the agreement of April 3, 1911 ; but also, that although prima facie the rights of the plaintiff passed to Francis Day & Hunter, Ld., under the agreement of April 3, 1911, yet the particular right of performing the film is reserved to and vested in the plaintiff by virtue of s. 19, sub-s. 7 (*c*), of the Act of 1911.

Before considering the terms of that Act it is important to bear in mind that the reproduction of an author's works, and the performance of them in public, are two distinct matters. Copyright to prevent reproductions was established by statute law long before the right to prohibit performance of the work in public was added to the rights of an author. It was not until 1833 that by 3 & 4 Will. 4, c. 15, an author of a dramatic piece was granted, as his property, the sole liberty of representing it, or causing it to be represented at any place of dramatic entertainment.

The Copyright Act, 1911, forms a code of copyright law. The previous Copyright Acts are repealed, and by s. 31 no person is to be entitled to copyright otherwise than under and in accordance with the provisions of the Act.

Before the Act was passed it had been decided in *Boosey* v. *Whight* (1) that rolls made for the purpose of enabling music to be mechanically produced from an organ were not " copies "

(1) [1900] 1 Ch. 122.

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of sheets of music within the Copyright Act, 1842. In passing it may be noted that Romer L.J. (1) states the rights of an author of a musical piece as: "(1.) to prevent others from copying the published music regarded as a book; and (2.) to prevent the music itself being performed in public without the author's permission." But he points out that the Legislature never contemplated that the author's right would entitle him to stop the use, in private, of a mechanical instrument because it performed the published music.

The Act of 1911 was drawn so as to deal with and prevent the production, or reproduction in any material form whatsoever, of an original musical work or the performance of the work or any substantial part thereof in public; and copyright included in the case of a literary, dramatic or musical work the sole right "to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered, and to authorise any such acts as aforesaid": see s. 1, sub-s. 2, and sub-s. 2 (*d*) of the Act. By s. 35: Performance means any acoustic representation of a work including such a representation made by means of any mechanical instrument.

The plaintiff's claim, which was amended so as to include a claim for wrongful authorization, is based upon the above section and does not embrace any other claim.

By s. 24, sub-s. 1, where the author of a work has assigned his rights, the substituted rights acquired under the Act and set forth in the Schedule pass to the assignee for the term contemplated by the assignment. In the case where a person has become entitled to both copyright and performing rights, as was the case of Francis Day & Hunter, Ld., under the assignment of April 3, 1911, the substituted right "is the copyright as defined by this Act." Thus the latter company became, and were, entitled to all the rights of production, reproduction and performance in public which are set out in s. 1, sub-s. 2, as above stated.

By s. 19 copyright is given and subsists in records and other contrivances by means of which sounds may be mechanically reproduced.

(1) [1900] 1 Ch. 125.

Then by sub-s. 7: in the case of musical works published before the commencement of the Act—which was July 1, 1912—the foregoing provisions are to have effect subject to the following modifications and additions: "(c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee."

Astbury J. has held that this clause of the sub-section restored to the author the copyright in the mechanical performance of his work. The words of the clause are not apt in my judgment to effect this result.

Sect. 19 is dealing with records and mechanical contrivances by which sounds may be mechanically produced. It does not in terms deal with the public performance resulting from operating those contrivances. The right of making and authorizing the making of contrivances is reserved to the author—but if the contrivances have been made in such a manner as the author could not prevent, the user of those contrivances which results in a public performance is not reserved by the sub-section to the author. The rights in the work and in the performance of it, as I have pointed out, have long been distinguished. While the new copyright in the records and other contrivances is established by sub-s. 1 of s. 19—that section does not deal with performance; and I cannot find in sub-s. 7 any express words, or any implication, which carries the reservation to the author beyond the making and authorizing the making of the records and other contrivances.

There is no question raised here as to the importation of the film. It is lawfully in this country. The only question is whether its user in public can be prevented by the author, who has assigned all rights of representing and performing the song to Francis Day & Hunter, Ld. They have given a licence under which the defendants have made use of the song, and that licence prevents the plaintiff inhibiting

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the defendants from performing the song as part of "The Singing Fool" film. The result is that the appeal must be allowed with costs and the action dismissed with costs.

LAWRENCE L.J. The plaintiff is the author of a musical work entitled "The Spaniard that blighted my life." On April 3, 1911, he assigned his copyright in that work "together with the sole right of representing or performing the same, or of causing or permitting it to be represented or performed except at music halls" to Messrs. Francis Day & Hunter, Ld. Nothing now turns upon the exception from this assignment of the right to perform the work at music halls. Astbury J. decided that the building in which the performance complained of in this action took place was not a music hall and in this Court the plaintiff did not dispute that finding. For the purposes of this judgment therefore I propose to treat the assignment as if it contained no exception.

The main question debated before us was whether by virtue of s. 19, sub-s. 7 (c), of the Copyright Act, 1911, the right to perform or authorize the performance of the work in public by means of a mechanical contrivance belongs to the plaintiff or to his assignees.

Before dealing with this question, however, it is convenient to dispose of a point taken on behalf of the plaintiff which logically comes first. Counsel for the plaintiff contended that the record used by the defendants in performing the work was imported into England in contravention of the provisions of s. 2, sub-s. 2, of the Act of 1911, and must therefore under s. 7 of that Act be deemed to be the plaintiff's property, the possession of which he was entitled to recover, with the result that the defendants were in unlawful possession of the record and were not entitled to use it for any purpose whatever whether private or public.

In my opinion this point is not open to the plaintiff on the pleadings. The statement of claim does not mention the importation of the record into this country, nor does it allege that the record used by the defendants was the plaintiff's

property or that the defendants were otherwise in wrongful possession of the record. If the plaintiff had intended to rely upon an infringement of his copyright under the provisions of s. 2, sub-s. 2 (*d*), he ought to have pleaded the relevant facts to bring his case within those provisions. The statement of claim as it stands makes it plain that the plaintiff based his case entirely upon an infringement of his alleged exclusive right to authorize the public performance of his work, that is to say, upon an infringement of his copyright under s. 1, sub-s. 2.

In these circumstances it would not be right to allow the plaintiff to set up a case of illegal importation of the record merely because of the use of the word "wrongfully" in para. 5 of the statement of claim. Further Mr. Moritz informed us that at the trial the plaintiff was given an opportunity to amend his statement of claim on this very point, of which opportunity however he did not avail himself being no doubt rightly advised that, if he had done so, any amendment he might have made in this respect would probably have involved an adjournment of the trial with further discovery and also payment of the costs thrown away. Moreover the evidence given at the trial falls far short of what in my opinion is necessary to establish a case of illegal importation within s. 2, sub-s. 2.

I now turn to the main question. Copyright in a musical work as it existed before the Copyright Act, 1911, was composed of two rights—namely, first, the sole right to multiply copies of the work; and secondly, the sole right to perform the work in public. The latter right, though analogous to the former, is a separate and distinct right. The former right was generally though somewhat loosely called the "copyright," and the latter the "performing right," and this nomenclature was adopted in the First Schedule to the Act of 1911, where the distinction between the two rights is clearly recognized. In practice an author not infrequently deals separately with these two rights in the same work, selling the right to perform the work in public and retaining the right to multiply copies of it or vice versa,

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or selling both rights to different persons. In all such cases of severance before the Act of 1911 the owner of the "copyright" had the sole right to multiply and authorize the multiplication of copies of the musical work and the sole right to sell and to authorize the sale of such copies for use in private, and the owner of the "performing right" had the sole right to perform and to authorize the performance of the work in public, with the result that the owner of the "copyright" could prevent any other person (including the owner of the performing right) from making copies of the work and the owner of the "performing right" could prevent any other person (including the owner of the "copyright") from performing the work in public.

In *Boosey* v. *Whight* (1) the Court of Appeal decided that the sale of perforated rolls of paper for use in a mechanical organ by means of which a musical work could be performed was not an infringement of the right to multiply copies of that work. Romer L.J., in the course of his judgment, made the following observations: "The rights under the Copyright Act"—that is, the Act of 1842—"of an author of a musical piece are (1.) to prevent others from copying the published music regarded as a book; and (2.) to prevent the music itself being performed in public without the author's permission. But anyone may perform the music in private by voice, musical instrument in the ordinary sense, such as a violin, piano and so forth, or by any mechanical instrument. And seeing that mechanical instruments for producing musical sounds were well known at the date of the Act, I think the legislature never contemplated that the author's right to multiply copies of published music would entitle him to stop the use in private of such an instrument because it performed the published music." This decision was generally accepted as laying down the principle that the sole right to multiply copies of a musical work did not include the sole right to reproduce the work by mechanical means such as gramophone records and the like, and therefore that the owner of the "copyright" in the work could not prevent

(1) [1900] 1 Ch. 122, 125.

others from manufacturing contrivances by means of which the work could be mechanically performed or from performing the work in private by means of such mechanical contrivances. The Court, however, did not purport to decide that the sole right to perform a musical work in public did not include the right to perform it in public by means of mechanical contrivances or that the owner of the "performing right" (be he the author or his assignee) could not prevent others from performing the work in public by means of such contrivances. It will be observed that Romer L.J., in the passage I have quoted, was careful to limit his remarks to the private use of such contrivances.

In my opinion the true view of the law as it stood before the Act of 1911 is that the owner of the "performing right" in a musical work had the right to prevent the public performance of the work not only by voice, musical instrument in the ordinary sense (such as a violin, piano and so forth) but also by means of mechanical contrivances.

If this be the right view—and my judgment is based on its correctness—Messrs. Francis Day & Hunter, Ld., by virtue of the assignment of April 3, 1911, were at the commencement of the Act entitled to prevent the public performance of the musical work in question by means of mechanical contrivances although they were not entitled to prevent the manufacture and sale of such contrivances or their use for performing the work in private.

One of the main objects of the Act of 1911 was to give to authors some protection against the mechanical representation of their works. The Act, accordingly, in s. 1, sub-s. 2, contains a new definition of copyright which, whilst retaining as one of the component rights the sole right to perform the work in public, enlarges the then existing sole right to multiply copies into the sole right to produce or reproduce and authorize the production and reproduction of the work in any material form, expressly including (in the case of a literary, dramatic or musical work) the sole right to make and authorize the making of any record or other contrivance by means of which that work may be mechanically performed or delivered, thus

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conferring upon the author of (inter alia) a musical work a new exclusive right to make and to authorize the making of records of it.

Under the combined operation of s. 24 and the First Schedule to the Act any person who immediately before the commencement of the Act is entitled to "copyright" and "performing rights" in a musical or dramatic work becomes as from that date entitled by way of substitution to copyright in that work as defined by the Act.

If the matter had rested there, Messrs. Francis Day & Hunter, Ld., would undoubtedly have been entitled as from the commencement of the Act on July 1, 1912, to (1.) the sole right to multiply and to authorize the multiplication of copies of the plaintiff's musical work including the sole right to make and to authorize the making of records by means of which it could be performed; and (2.) the sole right to perform and to authorize the performance of that work in public.

But then there is s. 19, sub-s. 7 (*c*), the true meaning and effect of which is the real question to be decided on this appeal. [His Lordship read sub-s. 7 (*c*).]

Sect. 19, in which this enactment occurs, contains a number of other provisions to which, however, it is not necessary to refer, as in my opinion they do not throw any light on the construction of sub-s. 7 (*c*) so far as regards the question we have to decide.

The object of sub-s. 7 (*c*) is fairly plain. As already explained, the Act by s. 1, sub-s. 2, conferred upon an author of a musical work a new exclusive right to make or to authorize the making of contrivances by means of which such a work could be mechanically performed. The Legislature no doubt considered that it would be unjust to the author that this newly conferred right should pass to the assignee under an assignment made at a time when such a right did not exist, and accordingly it was provided that this newly conferred right should belong to the author notwithstanding that he had assigned his copyright in the musical work. In my opinion the provision was not intended and does not operate

to take away from the assignee anything which had been assigned to him or to re-vest in the author any right which he had assigned before the Act, but merely to prevent the newly created right for which the author had presumably not received any consideration from passing to the assignee.

The rights reserved to the author under s. 19, sub-s. 7 (*c*), are strictly limited to the rights conferred by the Act in respect of making or authorizing the making of mechanical contrivances by means of which a musical work may be performed and to the benefit of the royalties payable by persons exercising the compulsory powers under sub-s. 2, which are royalties calculated on the retail selling price of the contrivances and not on the profits derived from the performance of the work in public. This reservation does not include any of the other exclusive rights (in particular the sole right to perform the work in public) which go to make up " copyright " as defined in s. 1, sub-s. 2, of the Act. All such other rights, including the sole right to perform the work in public, in my opinion remain vested, or, speaking more accurately, are by s. 24, sub-s. 1, re-vested, in the assignee.

The only rights expressly conferred by the Act in respect of the making or authorizing the making of contrivances whereby the musical work may be performed are those mentioned in sub-para. (*d*) of s. 1, sub-s. 2, and in the last sentence of that sub-section which confers the right to authorize the making of such contrivances but does not otherwise enlarge the scope of those rights.

The rights so conferred, no doubt, impliedly carry with them the sole right to sell and to authorize the sale of such contrivances and to use and authorize the user of such contrivances for the purpose of mechanically performing the musical work in private (see *Monckton* v. *Pathé Frères Pathephone, Ld.* (1)), but not the right to use or authorize the user of such contrivance for the purpose of performing the work in public.

In the circumstances of the present case, therefore, the effect of s. 19, sub-s. 7 (*c*), in my opinion is that the sole right

(1) [1914] 1 K. B. 395.

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to make and sell and to authorize the making and sale of records, by means of which the work in question may be performed, belongs to the plaintiff, but that this right does not carry with it the right to perform or to authorize the public performance of the work by means of such records or by any other means, which latter right passed to Messrs. Francis Day & Hunter, Ld., under the assignment of April 3, 1911, and belongs to them.

In the result, therefore, I agree that the appeal should be allowed with costs and that the action should be dismissed with costs.

RUSSELL L.J. The main question for our decision on this appeal may be stated thus. Was the plaintiff, at the date of the writ, the person in whom was vested the sole right to perform in public, by means of a record or other mechanical contrivance, the musical work or song known as "The Spaniard that blighted my life"? If the answer is "Yes," the appeal must fail; if the answer is "No," the appeal must succeed.

The answer depends upon the true construction and effect of the Copyright Act, 1911, as applied to the facts of this case. I need not re-state those facts. It is, however, in my view important to understand how matters stood immediately before the passing of that Act.

The plaintiff had by the document of April 3, 1911, assigned to Francis Day & Hunter, Ld., the right of making copies of the song and he had also (with an exception which for the purposes of this appeal is immaterial and which I disregard) assigned to the same persons the right to perform the song in public.

At the date of the assignment it was open to any one to make a gramophone record of the song. To do so was no infringement of the author's sole right to make copies: *Boosey* v. *Whight*. (1) Any one could use the record on a gramophone in private. No one, however, was entitled to use the record on a gramophone in public.

(1) [1900] 1 Ch. 122.

The position therefore immediately before the passing of the Act was, in relation to the song in question, as follows: first, if any one made a gramophone record of the song, neither the plaintiff nor Francis Day & Hunter, Ld., could complain of the act as an infringement of any of their rights; secondly, if any one performed the song in private by means of the record, neither the plaintiff nor Francis Day & Hunter, Ld., could complain of the act as an infringement of his or their rights; but, thirdly, if any one performed the song in public by means of the record, then Francis Day & Hunter (but not the plaintiff) could complain of the act as an infringement of the sole right (vested in them) to perform the song in public.

The Act of 1911 was passed on December 16, 1911, and came into operation in this country on July 1, 1912. I now turn to the Act to see how its provisions affected the song here in question and the persons then interested therein.

Sect. 24 and the First Schedule are the provisions which deal with works in existence at the commencement of the Act. The effect of these provisions is, as regards this song, that Francis Day & Hunter, Ld., being the persons who immediately before the commencement of the Act were entitled to the right of making copies and the performing right, became entitled in lieu thereof to "copyright as defined by this Act." In order to ascertain what is comprised in this substituted right, one must turn to s. 1, sub-s. 2, which defines "copyright" for the purposes of the Act. The definition is framed on curious lines: the word is stated to mean the sole right to do certain acts, and to include the sole right to do certain other acts, and the sole right to authorize any such acts.

The word is stated to mean, first, the sole right to produce or reproduce the work in any material form. (That I understand to be the right of making copies.) Secondly, the sole right to perform the work in public. (That I understand to be the right of performance.) Thirdly, the sole right to publish the work, if unpublished. Among the acts, the sole right to do which is said to be included in the word "copyright,"

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is an act described in para. (*d*) in these words : "in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered." By that provision the statute creates a new right, which did not exist under the old law. It provides that one of the rights which the ownership of copyright in a work carries with it, is the sole right to make any contrivance by means of which the work may be mechanically performed.

The statute confers the right, which according to *Boosey* v. *Whight* (1) did not exist under the old law, of preventing the manufacture of contrivances by means of which a work might be mechanically performed.

This is a right which may be of great value and which is different from the right of preventing public performances of the work. The two rights are quite distinct and may without inconvenience or inconsistency be vested in different persons.

As regards this new right (namely, the sole right (*d*)), how does the statute deal with that in regard to works, the copyright in which had been assigned before the passing of the Act ?

As regards works other than musical works, no special provision seems to be made. It seems by virtue of s. 24 to be vested, as regards those works, in the person in whom before the commencement of the Act was vested the right of making copies.

As regards musical works special provisions are made. These are contained in s. 19, sub-s. 7.

Sect. 19 contains provisions relating to mechanical contrivances. It provides for copyright to subsist in contrivances by means of which sounds may be mechanically reproduced. It provides that it shall not be deemed an infringement of copyright in a musical work to make a contrivance by means of which the work may be mechanically performed, if the maker proves certain matters therein mentioned, which

(1) [1900] 1 Ch. 122.

include payment of royalties at rates therein specified Sub-s. 7 deals with the case of musical works published before the commencement of the Act, and contains an important provision. [His Lordship read sub-s. 7 (*c*).]

That provision applies to the song here in question and the effect of it is this : it prevents the rights conferred by the Act in respect of the making or the authorizing the making of contrivances by means of which the song may be mechanically performed, from passing by virtue of s. 24 to Francis Day & Hunter, Ld. Those rights by virtue of s. 19, sub-s. 7 (*c*), belong to the plaintiff. The new rights which did not exist at the date of the assignment are to belong to the assignor and not to the assignee.

But does that entitle the plaintiff to restrain a performance of the song by means of the record ? Astbury J. has held that it does, and, as I read his judgment, on this ground : that the sole right to make and authorize the making of the contrivance carries with it another right—namely, the sole right to authorize performance of the work by means of the contrivance.

This is, in my opinion, a view which is not justified by the terms of the Act. The words in s. 19, sub-s. 7 (*c*), " rights conferred by this Act in respect of the making, or authorising the making, of contrivances," have nothing to do with the rights of performance in public. They only relate to the manufacture of certain means of performing the work. The decision of the learned judge seems to me to involve this : that whereas before the Act Francis Day & Hunter, Ld., were entitled to the sole right of performing the work in public by means of a gramophone record, that right has, without compensation, been taken away from them by the Act and vested in the plaintiff.

It would require very clear words to justify a construction of the Act which involved such a result. There appears to me some confusion of thought in the proposition that the sole right to make a gramophone record of a song necessarily carries with it the sole right to perform the song in public by means of a gramophone record. The two rights are quite

C. A. 1929 THOMPSON v. WARNER BROS. PICTURES, LD. Russell L.J.

distinct. A gramophone record is primarily and principally for private use and consumption. The person who owns the sole right to manufacture a record is in a position to reap a harvest of royalties arising from the retail sales of the record when made. Public performances of the song by means of the gramophone record are no injury to him as owner of the sole right to manufacture records. On the contrary they may advertise the merits of the record and swell his royalties. The person who is injured by a public performance of the song by means of the gramophone record is the owner of the sole right to perform the song in public. The public performance by gramophone is an infringement of his sole right. I am unable to find any justification in the Act for the view (which is involved in the decision in the Court below) that the sole right to perform the song in public has been split in two; and that the right to perform the song in public by mechanical means is in the plaintiff, while the right to perform the song in public otherwise than by mechanical means is in Francis Day & Hunter, Ld.

The learned judge relied to some extent upon the case of *Monckton* v. *Pathé Frères Pathephone, Ld.* (1), not indeed as a decision upon the point which he had to decide, but by reason of some expressions used by Buckley L.J. in the course of his judgment. The question for decision in that case was whether the defendants could, after the commencement of the Act, sell, without paying royalties thereon, records made in Belgium and imported into the country before the commencement of the Act. The Court of Appeal held that they could not. I feel a difficulty in seeing how the sales there in question were sales of a work which infringed copyright, for the articles sold were neither made nor imported in contravention of the provisions of the Act. But, however that may be, the remarks of Buckley L.J. to which the judge refers in his judgment appear not to be necessary for the decision arrived at.

Moreover, the Court was not dealing with a case where the author had, before the Act, assigned the copyright. In

(1) [1914] 1 K. B. 395.

using the language (1) upon which counsel so strongly relied before us, Buckley L.J. was referring to the case where the new and extended copyright as defined by the Act was all vested in one owner. He was not purporting to say that the author as owner of the new right covered by s. 1, sub-s. 2 (*d*), possessed as against his assignee of the copyright which existed under the old law, the sole right of performing the work in public by mechanical means.

In the result I am of opinion that the sole right to perform the song in public by means of a record or other mechanical contrivance was not at the date of the writ vested in the plaintiff.

Two other matters were argued before us.

It was attempted to raise a case of alleged infringement under s. 2, sub-s. 2; but I am satisfied that no such case is raised on the pleadings. Further, if it were I should, as at present advised, be prepared to hold upon the facts of this case that there was no knowledge by the defendants within the requirements of that sub-section.

Finally, it was said that the plaintiff was in any event entitled to some order for delivery up by virtue of s. 7 of the Act, upon the footing that the record was in fact an infringing copy of the song. The only real benefit which such relief could confer upon the plaintiff would be in relation to costs. I am however of opinion that in view of the definition of "infringing" contained in s. 35, the plaintiff is not entitled to any such relief. The record was not made in contravention of the provisions of the Act; it was made abroad. Nor is it proved that it was imported in contravention of any such provision. It has not been established (indeed, the contrary seems to be the fact) that the record, to the knowledge of the importer, infringed copyright.

For these reasons I am of opinion that the decision in the Court below was wrong and that the appeal succeeds.

Solicitors for plaintiff: *Edmond O'Connor & Co.*

Solicitors for defendants: *Bristows, Cooke & Carpmael.*

H. C. G.

(1) [1914] 1 K. B. 405.

CLAUSON J.

1929

March 21; *April* 11.

PRESTON CORPORATION *v.* PYKE.

[1928. P. 1319.]

Burial—Burial Ground—Rights of Parishioner—Unconsecrated Ground—Allotment for Accommodation of religious Denominations—Mutual exclusive Rights—Burial Rites and Ceremonies in allotted Ground—Power of Attorney-General to control Burial Board—Burial Act, 1852 (15 & 16 *Vict. c.* 85), *ss.* 30, 32—*Burial Act*, 1853 (16 & 17 *Vict. c.* 134), *s.* 7—*Burial Act*, 1900 (63 & 64 *Vict. c.* 15), *ss.* 1, 2, 12; *and Sch.* 2.

Sect. 7 of the Burial Act, 1853, upon its true construction, authorized the allotment by a burial board of portions of the unconsecrated part of a new burial ground for burials exclusively of parishioners belonging to the particular religious denomination for whom an allotment is made.

Under the provisions of the Burial Acts such an allotment was in 1854 made by the plaintiffs, as the burial board, of a portion of the unconsecrated ground for the burial of the Roman Catholic parishioners. Upon an originating summons under Order LIV.A, r. 1, taken out by the plaintiffs to have it determined whether, by virtue of that allotment for the Roman Catholic parishioners, a deceased parishioner not a member of the Roman Catholic denomination could be buried in such allotted portion; and if he could, whether he could be so buried with the rites or ceremonies of any denomination other than those of the Roman Catholic:—

Held, first, that the portion so allotted for the Roman Catholics was by virtue of its allotment appropriated exclusively for the burial of the Roman Catholics; secondly, that a Roman Catholic parishioner had, under the Burial Acts, no greater rights in the portion so allotted for their burial than a parishioner, as such, had, before those Acts, in his old parish burial ground; and, consequently, although he still has, under those Acts, a right of interment in that allotted portion, he has no individual right, as a parishioner, to interfere with the burial therein of a parishioner of a different denomination; thirdly, the Attorney-General is entitled in properly constituted proceedings, if he should think fit to institute them, to an order restraining the plaintiffs from permitting the burial of persons other than Roman Catholics in the portion allotted to Roman Catholics; fourthly, that nothing in the Burial Act, 1853, enables any particular rites or ceremonies to be enforced in regard to burials within the portion allotted to Roman Catholics or renders the performance in regard to such burials of any particular rites or ceremonies unlawful.

ADJOURNED SUMMONS.

In the year 1854, under the provisions of the Burial Acts, 1852 and 1853, a burial board was constituted and a new burial ground was provided for the parish of Preston, which in due course became the burial ground of that parish. The ground was divided in accordance with the Act into a part to be consecrated and an unconsecrated part. The

unconsecrated part was duly allotted by a resolution of the board dated July 19, 1854, by which it was resolved that eight acres should be unappropriated for the present and that the remaining thirty-seven acres should be assigned in the following proportions: Church of England, nineteen acres; Roman Catholic, eleven acres; Dissenters, six acres; and one acre for lodges, etc. Such division and allotment were made with the sanction of a Secretary of State: see s. 7 of the Burial Act, 1853. The nineteen acres allotted for the Church of England were on June 11, 1855, duly consecrated; and on October 2, 1855, the portion allotted for Roman Catholics was, with the sanction of the board, consecrated according to the rites and ceremonies of the Roman Catholic Church, but it was not disputed that the consecration of the Roman Catholic portion had no legal operation.

As a preliminary to the consecration of the portion allotted for Roman Catholics the seal of the burial board was under a resolution of the board passed on September 19, 1855, affixed to a document, which was received in evidence at the hearing, by which, after reciting the formation of the burial board, the purchase by the board of the burial ground and the allotment of the portion therein specified for the burial of the Roman Catholic parishioners, it was declared that the board, so far as in it lay, did separate and set apart a piece of ground shown on the plan annexed thereto (which was in fact the Roman Catholic portion of eleven acres) from all common and profane uses whatsoever, and to be used exclusively for the interment of the dead according to the rites and ceremonies of the Roman Catholic Church for ever.

Under the Preston Corporation Act, 1914, the Corporation became the burial authority for the borough of Preston, and all the powers and duties of the former burial board under the Burial Acts, 1852 to 1906, became vested in and devolved upon the Corporation and the Preston Cemetery, and all lands, buildings and rights of the board were transferred to the Corporation.

Since the year 1887, probably owing to the facilities afforded by the Burial Laws Amendment Act, 1880, there were frequent

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interments of parishioners who were not Roman Catholics in the portion of the burial ground allotted for Roman Catholics with burial rites other than Roman Catholic rites, with the result that complaints were made to the Corporation, as the burial authority, by the defendant Canon Pyke, a Roman Catholic parishioner, against that practice of burial, and, accordingly, a summons was taken out by the Corporation, under Order LIV.A, r. 1, to have it determined, first, whether or not by virtue of the division and allotment under the Burial Acts, 1852 and 1853: (*a*) it was lawful for a deceased person not of the Roman Catholic denomination to be buried in the portion of ground allotted for parishioners of that denomination (i.) where he is an original grantee of a grave space, and (ii.) where there has already been a burial of a Roman Catholic in such grave space, and (*b*) it was lawful for him in either case to be so buried (i.) with the Church of England service at the grave; (ii.) with the service of any denomination other than the Roman Catholic service; and (iii.) without any service, and secondly, how far, having regard to the allotment aforesaid, the rights of burial therein, whether with or without a particular religious service, depended on the form of grant of grave space made by the burial authority under their powers. None of the parties objecting to the jurisdiction on the ground that the "instrument" in Order LIV.A, r. 1, might not include an Act of Parliament, and the Attorney-General, waiving any objection on the ground that in respect of public rights he might not be "a person interested" within the rule, Clauson J. consented to decide the questions, in so far as they involved the determination of the rights of the three individual parishioners made defendants, and in so far as they were questions which could be raised between the Attorney-General and the Corporation in an action by the former, either ex officio or on the relation of a subject against the Corporation in their character of a burial authority.

F. H. L. Errington for the plaintiffs [after stating the facts to the Court:] Sects. 10 and 11 of the Burial Act, 1852,

provided for a meeting of the vestry to determine whether a new burial ground should be provided for the parish and for the appointment of a burial board, which by s. 25 was obliged to provide a burial ground for the parish. By s. 30 the board is empowered to have the ground consecrated, and it obliged them to set apart a part as unconsecrated ground. The provisions of that Act relating to the provision of a new burial ground and interment therein (which were confined to the Metropolis) were extended by the Burial Act of 1853 to parishes outside the Metropolis, and s. 7 of the Act of 1853 provided for the setting apart of an unconsecrated part (see now ss. 1, 2, of the Burial Act, 1900) and the allotment of portions of the unconsecrated part amongst the various religious denominations. By s. 33 of the Act of 1852 the board might sell an exclusive right of burial in perpetuity. By s. 38 of the same Act the general management, regulation and control of the burial ground were placed in the hands of the board. The Burial Laws Amendment Act, 1880, permitted "cross-over" burials. A parishioner now has the same right of applying to the High Court to prevent the burial in his parish ground of a non-parishioner as he formerly had of applying to the Ecclesiastical Court. In the present proceedings, of a friendly nature, the plaintiffs are merely seeking a declaration upon the questions raised for their guidance in framing appropriate regulations.

Gover K.C. and *P. Redmond Barry* for the Very Rev. Canon Pyke, Vicar-General of the Roman Catholic Diocese of Lancashire. No parishioner other than a Roman Catholic parishioner has the right of interment within the portion allotted under the statutes for Roman Catholics. Upon the proper construction of the Burial Acts, and especially of s. 7 of the Act of 1853, burial in any portion allotted is confined to parishioners of that particular denomination for whom the portion has been allotted to the exclusion of any other denomination. The burial in the Roman Catholic portion of parishioners who are not Roman Catholics, and any burial in their portion with rites other than those of the Roman Catholic Church is illegal. The board has no power by grant

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or otherwise to alter or vary the effect of a statutory allotment made to the exclusive use of Roman Catholics or to grant a right of interment to any person therein other than a Roman Catholic. That the board held the view that the right of interment is an exclusive right is evidenced by the document of September 19, 1855, and also by the form of the grant of a grave space used by the board, which purports to grant the "exclusive" right of burial therein. The expression "allotted" in s. 7 of the Act of 1853 necessarily connotes the characteristic of exclusive user, and the Legislature recognized, by some of the provisions contained in the Burial Act, 1900, that a portion allotted under s. 7 of the Act of 1853 for a particular denomination was allotted for the exclusive use of that denomination. For instance, by s. 2 of the Act of 1900 a burial authority is empowered at the request and cost of the parishioners of a particular denomination to erect a chapel for funeral services according to the rites of that denomination, upon the portion allotted to it.

Wilfrid Hunt for the Rev. Canon A. J. Morris, the Vicar of Preston. The right of a parishioner belonging to a particular denomination to be buried in the portion appropriated for his denomination is not an exclusive right of burial. He has a right to be buried in either the consecrated part or the unconsecrated part. Under s. 32 of the Burial Act, 1852, the ground provided by the board under the Acts is to be deemed to be the burial ground of the parish. Under the Act of 1880, s. 1, the person having charge of a burial is given the right of requiring that the burial shall be without the rites of the Church of England, and (by s. 6) without any religious service or with such Christian and orderly religious service as he may think fit, and may invite any friend to conduct such a service. By s. 12 a clergyman of the Church of England is protected against ecclesiastical censure if he performs the Church of England service in any portion of the unconsecrated part of the burial ground. The effect of the Act is to allow a Church of England parishioner to be buried in any portion of the unconsecrated part, including the Roman Catholic portion, with the Church of England

service. The provisions of that Act are paramount over any regulations made by the board, which has no authority to prescribe in a grant of grave space the particular rites to be performed.

Stamp for the Rev. Charles H. Pitt, Wesleyan Minister. The policy of the Burial Acts, when examined, is, subject to s. 38 of the Act of 1852, to preserve to the parishioner, to whatever denomination he may belong, a right of sepulture in any of the allotted portions of the burial ground, corresponding with his old right of burial in his parish burial ground. A Roman Catholic parishioner of Preston has a right to be buried in the Roman Catholic allotted portion only because he is a parishioner. His right is not greater than but is conterminous with his right as a parishioner. The Acts substitute the test of the service at the graveside for that of the deceased parishioner's profession of belief. They recognize the legitimacy of the desire for the principle of "cross-over" burials. The burial board takes the place of the parish vestry. Expenses are to be met out of parish rates. A burial ground is to be provided for the parish: ss. 25, 32, of the Act of 1852. It is to be embellished at the expense of the parish: s. 30. The burial board, instead of the vicar, decides upon the spot where a parishioner may be buried, and has power to permit the burial of a non-parishioner (see s. 34, and *Littlewood* v. *Williams* (1)) provided that the rights of parishioners are not thereby interfered with. The allotment of portions of the burial ground under the Acts does not interfere with the common law rights of a parishioner over the whole of the ground provided under the Acts. A Roman Catholic parishioner's right to be buried in some other portion than that allotted for his own denomination depends entirely on s. 32 of the Act of 1852. No parishioner of a particular denomination has a right to exclude from burial in the portion allotted for his denomination any parishioner of a different denomination from his own. The policy of the Acts is to confer rights rather than to impose disabilities. Sect. 7 of the Act of 1853 confers upon a

(1) (1815) 6 Taunt. 277.

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parishioner, in addition to the rights which he has at common law to be buried in any portion of the burial ground, the right to be buried in the particular portion allotted for parishioners of his own denomination, if he prefers it. No religious test is imposed on his right to be buried in his allotted portion. The right of burial which a parishioner, as such, has at common law is not affected by the Burial Laws Amendment Act, 1880. That Act confers upon him a special right of burial in the portion allotted for the denomination to which he belongs. A clergyman of the Church of England may perform the service of that Church in any portion of the unconsecrated part (s. 12), and a Nonconformist is at liberty to be buried in the consecrated part with the Church of England service. Under the general powers of management given by s. 38 of the Act of 1852, the board had power to direct that some service other than that of the Roman Catholic Church should be performed in the portion allotted to Roman Catholics.

Sir Thomas Inskip A.-G. and *Stafford Crossman* for the Attorney-General. The Attorney-General appears here to protect the interests of the public generally. Whatever order the Court sees fit to make should be without prejudice to any subsequent independent proceedings he may think proper to bring at the relation of a member of the public, in regard to which a declaration made upon this application will be a useful guide.

Cur. adv. vult.

April 11. CLAUSON J. This is an originating summons under Order LIV.A, which enables any person claiming to be interested under a deed, will or other written instrument to apply for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested. Rule 4 of that Order provides that the judge shall not be bound to determine any such question of construction, if, in his opinion, it ought not to be determined on originating summons.

By the Burial Act, 1852, provision was made in regard to parishes within the Metropolis for enabling a burial board

to be set up to provide a burial ground for the parish (see ss. 10, 11, 25), which ground, as soon as the consecrated portion of it is consecrated, is to be deemed the burial ground of the parish, and the parishioners and inhabitants of the parish are to have the same rights of sepulture in such burial ground as they respectively would have had in the burial ground for their parish, subject nevertheless to the provisions in the Act contained: see s. 32. Sect. 33 enables a burial board to sell the exclusive right of burial in any part of any burial ground provided by them, and s. 38 vests the general management, regulation and control of the ground in the burial board, subject to the provisions of the Act and the regulations to be made thereunder. The Burial Act of 1853 extends the Act of 1852 to parishes not in the Metropolis.

It is well settled that the right of sepulture of a parishioner in the burial ground of his parish is a right to be buried in the burial ground, but this right carries with it no right (subject possibly to the operation, in particular cases, of faculties granted by the proper Ecclesiastical Court) of selection of the particular spot for the interment: *Ex parte Blackmore.* (1) No parishioner has, as such, any right to restrain or interfere with the burial of any other parishioner in the parish burial ground; indeed, it would seem that no parishioner, as such, has any right to interfere with the burial in the parish burial ground of a non-parishioner, save possibly if he can establish that such a burial causes actual inconvenience to the parishioners, that is, by unduly restricting the area available for interment: see *Littlewood* v. *Williams.* (2)

At common law a parish burial ground must be, or must be taken to be, consecrated ground. The Burial Act of 1852, however, marks a new departure in this matter. Sect. 30 of that Act directs a burial board to set apart a portion of the burial ground provided by them which is not to be consecrated, and s. 7 of the Burial Act, 1853, provides that in all cases in which any burial board provides a new burial ground, it shall be divided into consecrated and unconsecrated parts in such proportions and the unconsecrated part thereof

(1) (1830) 1 B. & Ad. 122. (2) 6 Taunt. 277, 282.

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shall be allotted in such manner and in such portions as may be sanctioned by the Secretary of State. The Acts thus make it necessary that a burial ground provided under them should be in part consecrated and in part unconsecrated and that the unconsecrated part should be "allotted." There is a provision (s. 32 of the Act of 1853) that the parishioners are to have the same rights of sepulture in the new ground as they would have had in the old parish burying ground, but the Act throws no direct light upon the effect, on the parishioners' right of sepulture, of the provision that part of the new parish burial ground is to be unconsecrated, nor upon the effect of "allotment." The section (s. 7 of the Act of 1853) which directs "allotment" refers, in the last clause, since repealed by the Burial Act, 1900, to the "portion of ground set apart for burials otherwise than in accordance with the rites of the Church of England." The most conspicuous effect of consecration, and that which one knows, as a matter of history, has caused the greatest practical trouble in regard to burial matters, was to make the performance of a service according to the rites of the Church of England a necessary accompaniment to every burial of a baptized person in the parish burial ground. The latter clause of s. 7 seems to make it reasonably clear that some part, at all events, of the unconsecrated ground is to be set apart for burials otherwise than according to the rites of the Church of England. This seems to suggest that the "allotment" was to result in the setting apart of certain areas for burials with non-Church of England rites, and as the section seems clearly to contemplate the unconsecrated land being divided into more portions than one, it seems to follow that the various portions are to be differentiated from one another by the characteristic of providing burial accommodation for different classes of persons who, while concurring in an objection to Church of England rites, differ as to the proper accompaniments of sepulture. The obvious meaning seems to be that the several allotments are to be made for the accommodation of several religious denominations. Just as the provision of an unconsecrated part of the burial ground implies division

between burials of persons who accept Church of England rites on the one hand and those who do not on the other, so allotment of the various portions of the unconsecrated ground implies division between burials of persons belonging to the several denominations for whom the allotment is made. Division in those circumstances seems to me to involve some measure of mutual exclusion. Accordingly s. 7 seems to me, prima facie, to authorize the allotment of portions of the unconsecrated ground for burials exclusively of persons belonging to a denomination for whom an allotment is made. There is, I think, some support for this construction of the Act to be found in the language of the Burial Act, 1900. That Act makes certain provisions as to the erection of chapels by, among other authorities, such a burial board as that of Preston, which is the board concerned in the present case, and incidentally refers to any part of their burial ground "which is not consecrated or set apart for the exclusive use of a particular denomination," and to "ground appropriated to the use" of a particular denomination. It may be that there are cases to which the Act of 1900 would apply (though I was not told of any such case) in which the appropriation of part of the unconsecrated portion of a burial ground to the exclusive use of a particular denomination has been effected by some means other than "allotment" under s. 7 of the Act of 1853; but I cannot but think that the Legislature must have had in mind such an allotment, and that I am justified in treating the Act of 1900 as a recognition that allotment under s. 7 of the Act of 1853, has the effect of an exclusive appropriation. [His Lordship then stated the facts above set out relating to the division and allotment of the burial ground and the consecration of portions thereof and proceeded as follows:] Since the present summons was before the Master a document has been found and is now in evidence before me which, curiously enough, was not among the archives of the burial board. [His Lordship then referred to the document of September 19, 1855, and the declaration contained in it.] If that which I have stated above as the prima facie construction of s. 7 is the true

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construction, this document would seem to declare with reasonable accuracy the effect of the allotment already made. It is true that it does not state in so many words the true fact, which is that the ground is allotted for the exclusive burial of Roman Catholics, which is not necessarily the same thing as burial of persons with Roman Catholic ceremonies, but the point, if observed at all, was probably regarded (and no doubt rightly) as of little or no practical importance.

By the Burial Act of 1880, a crucial alteration was made in the law as to the rites and ceremonies of interment. Since that Act, subject to certain provisions as to notice, etc., which it is not necessary to consider in detail, the body of a person who has a right of interment in a burial ground (an expression which, in regard to a parish burial ground, would obviously include a parishioner) can as of right be interred therein with rites and ceremonies other than those of the Established Church, notwithstanding that the burial ground is consecrated, and (see s. 12) the body of a person who has a right of interment in an unconsecrated burial ground vested in any burial board can, as of right, be interred therein with the rites of the Church of England. It is convenient to state these provisions of the Act, but my task is to construe the Burial Act, 1853, and for this purpose the Act of 1880 does not assist me.

It appears from the evidence that up to the year 1887, none but Roman Catholics were buried in the Roman Catholic portion of the Preston parish burial ground. Since 1887, from time to time, parishioners who were not Roman Catholic have been buried in the Roman Catholic portion of the burial ground, with rites and ceremonies other than those of the Roman Catholic Church. I gathered from the statement of counsel, though the evidence is not quite clear on the point, that these have all been cases where an interment took place by virtue of a grant under s. 33 of the Act of 1852 of an exclusive right of burial obtained prior to the death of the person interred. The form of grant which is used is in evidence before me, and it confers an exclusive right of burial in a particular grave plot, to hold the same in perpetuity for the

purpose of burial, subject to the rights and regulations now in force or which may hereafter be issued or adopted for the management of the burial ground. There is not, however, before me, so far as the evidence shows, any person who holds or claims under any such grant, and I, accordingly, am not in a position to give any decision on the operation of any such grant heretofore made, though some interesting points as to the operation of such a grant were argued before me.

On December 15, 1926, the defendant Canon Pyke, who is a Roman Catholic parishioner of Preston, suggested to the board that the interment in the Roman Catholic portion of the parish burial ground of persons other than Roman Catholics with rites other than Roman Catholic rites, was an invasion of right and illegal. It is because of this suggestion that the present proceedings have been taken.

The summons was taken out by the Corporation, as the burial authority, and the defendants are Canon Pyke, a Roman Catholic parishioner; Canon Morris, a Church of England parishioner; and the Rev. C. H. Pitt, a dissenting parishioner, and the Attorney-General. [His Lordship then stated the questions raised by the summons and continued:] The argument presented on behalf of the defendant Canon Pyke was that the allotment as Roman Catholic of the Roman Catholic portion of the parish burial ground conferred on the Roman Catholic parishioners, on the true construction of s. 7 of the Act of 1853, the right to burial exclusively of all other parishioners in the Roman Catholic portion of the parish burial ground and that the burial therein of any non-Roman Catholic persons, or of any persons otherwise than with the rites and ceremonies of the Roman Catholic Church is illegal, and that every Roman Catholic parishioner has, as such, a legal right to prevent the interment therein of a non-Roman Catholic, or any interment therein otherwise than with the rites and ceremonies of the Roman Catholic Church. It was not suggested, nor indeed could it be suggested that the Acts confer any right upon the Roman Catholic Ecclesiastical Authority as such.

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As against Canon Pyke, it was argued that the whole of the burial ground, whether consecrated or unconsecrated, including the part allotted as Roman Catholic, is to be deemed the parish burial ground; that a parishioner's right of burial confers on him at common law a right of interment for himself, but no right to interfere with the burial of any other parishioner or indeed to interfere with the burial of a non-parishioner, at all events, unless such burial causes actual inconvenience to the parishioners (e.g.) by unduly restricting the area available for interment, and, of course, no such case is suggested here. It was argued that it would be odd, if the Act were to confer on parishioners of a particular denomination, in respect of the portion of the burial ground allotted to that denomination, rights different in kind and degree from those possessed by parishioners generally in respect of the parish burial ground; it was said that the meaning of the Act is that allotment as Roman Catholic of a portion of the burial ground is to give to Roman Catholic parishioners such rights in the allotted portion as parishioners have in the burial ground generally—namely, the right of burial in the allotted portion of the ground with, possibly, the right to object to the burial there of others than Roman Catholic parishioners, if such burials cause actual inconvenience to the Roman Catholic parishioners (e.g.) by unduly restricting the area available for interment, but that the section contains no words which expressly or by implication create the suggested right, of an unprecedented kind hitherto unknown to the law, of an individual parishioner to seek to interfere with the burial in the parish burial ground of other persons.

In answer to the suggestion that, whether or not Roman Catholic parishioners had an individual right of action to prevent non-Roman Catholic burials within the Roman Catholic portion of the parish burial ground, s. 7 made it illegal for the burial board to permit any burial in the allotted portion of the burial ground other than a Roman Catholic burial, it was argued that there was no express provision preventing such burials, and it was suggested that there was

nothing in the section from which the creation of an exclusive privilege could be implied. It was further argued that throughout the Burial Acts the Legislature showed an increasing tendency to restrict anything in the nature of exclusive privilege rather than to create new exclusive privileges. In regard to s. 2 of the Burial Act, 1900, it was argued that whether or not the language can be explained by provisions in local or private Acts, at all events the language used in that Act could be of little assistance in construing an Act which had become law forty-seven years earlier.

In one respect, I am of opinion that the arguments of those who opposed Canon Pyke's claims prevail. I am unable to find in the statutes any trace of an intention to confer on a Roman Catholic parishioner, as such, any greater right over the Roman Catholic portion of the parish burial ground than a parishioner, as such, had over the old parish burial ground; while recognizing that Canon Pyke has a right of burial in the Roman Catholic portion of the parish burial ground as a Roman Catholic parishioner, I cannot find any legal right in him to control the burial of others in that ground. But I am unable to accept the arguments put forward in opposition to Canon Pyke's argument on the wider question of the construction of s. 7 of the Act of 1853. I have already stated my view of the prima facie construction of that section, and the arguments of counsel have not enabled me to find anything, either expressed or implied in the Acts, which precludes me from accepting that construction as the true one.

In the view that I take of the true construction of the Acts I am of opinion, and I will so declare, that in the events which have happened the eleven acres of the unconsecrated part of the Preston parish burial ground allotted for Roman Catholics by the resolution of July 19, 1854, are appropriated exclusively for the burial of Roman Catholics, and that the Attorney-General is entitled in proper proceedings (if he thinks fit to institute such proceedings) to obtain an order restraining the plaintiffs, the Corporation of Preston, from permitting the burial of persons other than Roman Catholics in the said eleven acres.

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I have to add that no argument was addressed before me to any distinction between the case where there has already been a burial in a particular grave space and the case where a grave space is vacant. Further, in view of the absence of any person claiming under a grant of a grave space, I am not in a position to make any declaration as to the rights of any such grantee. I must also add that I can find nothing in the statute of 1853 which renders unlawful the performance of any particular rites or ceremonies in the unconsecrated part of the parish burial ground, which includes the Roman Catholic portion of that ground, still less anything which enables any particular rites or ceremonies to be enforced there. The question as to the possible operation, in any case to which it applies, of s. 12 of the Act of 1880 cannot properly be determined, since I have not before me any executor of a Roman Catholic claiming to have the body of his testator buried with Church of England rites. If however the Attorney-General raises no objection to my making a declaration that nothing in the Act of 1853 contained enables any particular rites or ceremonies to be enforced in regard to burials within the Roman Catholic portion of the Preston parish burial ground or renders the performance in regard to such burials of any particular rites or ceremonies unlawful, I will make such a declaration.

I cannot see my way to deal with the second question on the summons, if only because that question may affect absent grantees; in any case I should feel a difficulty in dealing in general terms with the question raised.

Solicitors: *Sharpe, Pritchard & Co., for Alfred Howarth, Town Clerk of Preston; Norris, Allens & Co., for W. Banks & Co., Preston; Gregory, Rowcliffe & Co., for Houghton, Reveley, Craven & Wilkins, Preston; and for Finch, Johnson & Co., Preston; The Treasury Solicitor.*

NOTE.—The Attorney-General raised no objection to the last part of the declaration in regard to rites and ceremonies. The order was post-dated June 25, 1929.

H. C. H.

In re CONQUEST.

ROYAL EXCHANGE ASSURANCE *v.* CONQUEST.

CLAUSON J.

1929

May 7.

[1929. C. 571.]

Tenant for Life and Remaindermen—Structural Repairs and Reconstruction —Incidence of Costs—Trustees for Sale—Powers of managing Land—Power to Pull down, Rebuild and Repair—Alterations proper to enable Building to be Let—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-s.* 1—*Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 73, *sub-s.* 1 (*iii.*); 84, 90, *sub-s.* 1 (*v.*); 102, *sub-s.* 2 (*b*) *and sub-s.* 3; *Third Schedule, Part I.* (*xxiii.*).

The effect of s. 28, sub-s. 1, of the Law of Property Act, 1925, is to give trustees for sale two sets of powers—(1.) the powers of management of land conferred on trustees during minority by s. 102 of the Settled Land Act, 1925, including powers to "erect, pull down, rebuild and repair houses" (see sub-s. 2 (*b*)), the cost incurred in exercising any of those powers being payable out of income (see sub-s. 3 of s. 102); and (2.) the powers which under s. 84 of the same Act, coupled with the provisions of the Third Schedule thereto, a tenant for life can exercise of making improvements and paying for them out of capital.

Under the will of a testator who died in 1901, certain freehold houses were vested in trustees upon trust for sale with a direction to divide the proceeds amongst the testator's children in certain shares which were settled by the will upon trusts under which each child took a life interest in his or her share with remainder to his or her children. The trustees having, in exercise of their power to postpone the sale, retained the houses, expended money in repairing the same, the work of repair being of the character of rebuilding or structural repairs. Upon a summons by the trustees to have it determined whether they ought to pay those expenses out of capital or out of current income:—

Held, that, as the work of structural repairs fell within the class of work particularized in Part I. of the Third Schedule to the Settled Land Act, 1925, which the trustees, by virtue of s. 28 of the Law of Property Act, 1925, and s. 84 of the Settled Land Act, 1925, have power to execute and pay for out of capital, the sum of 727*l.* 10*s.* 6*d.* required for those repairs ought, in the circumstances, to be raised and paid out of the capital of the residuary estate, without any recoupment out of income.

If any of the powers conferred by s. 28, sub-s. 1, of the Law of Property Act, 1925, overlap, trustees for sale will, in exercising their choice between such powers, be properly guided by the equitable principles laid down in *In re Hotchkys* (1886) 32 Ch. D. 408.

Nothing stated in the judgment in *In re Gray* [1927] 1 Ch. 242, as to the application of those principles, is to be construed as an authority contrary to the above proposition.

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ADJOURNED SUMMONS.

George A. O. Conquest by his will dated May 3, 1901, devised and bequeathed his real and personal estate to trustees upon trust to sell and convert the same and out of the proceeds thereof to pay his funeral and testamentary expenses and debts and legacies and to invest the residue of the moneys and stand possessed of his residuary trust funds upon trust to divide the same into thirty-eight shares and appropriate the same in the proportions in the will mentioned amongst his nine children therein named: and the testator directed that the shares should not vest absolutely in his children, but should be retained by the trustees. Then followed a settlement of the shares upon trusts under which each child took a life interest with remainder to his or her child or children, if more than one, in equal shares. It was declared that the trustees might postpone the sale and conversion so long as they should think fit and that the rents and profits and income to accrue from and after the testator's decease of and from such parts of his residuary estate as should remain unsold should, after payment thereout of all incidental expenses and outgoings be for all the purposes of his will and as between all persons interested thereunder paid and applied to the persons to whom and in the manner in which the income of the moneys to arise from such sale and conversion would for the time being be payable and applicable if such sale and conversion had actually taken place. The will gave the trustees powers to let the hereditaments remaining unsold and generally to manage the same with all the powers in that behalf of an absolute owner.

The testator died on May 14, 1901, leaving surviving him the nine children named in his will, some of whom married and had children. The trustees in exercise of their power under the will retained part of the residuary freehold estate consisting of certain houses situate at Gordon Street, Islington, and since the testator's death paid the rents thereof to the tenants for life according to their respective shares. In August, 1928, in the course of carrying out some repairs to those houses, serious structural defects were discovered in

three of them which necessitated pulling down and rebuilding some of the walls, renewing roof-timbers, retiling and providing new gutters and renewing defective floor-joists and sashes at a cost of 727*l.*

The summons was taken out by the trustees, the children and a grandchild (who was ordered to represent the remaindermen) being made defendants, to have it determined whether, upon the true construction of the will or by the effect of the Settled Land Act, 1925, the 727*l.* required to be expended upon the structural repairs to the houses Nos. 16, 17 and 18 Gordon Street ought to be raised and paid by the trustees out of the corpus of the residuary estate or out of the current income of the residuary estate, and, if out of corpus, whether the trustees ought to recoup such payment out of income by instalments spread over a number of years.

W. F. Swords for the plaintiffs.

H. C. Bischoff for the tenants for life. The cost of the repairs so far as they are in the nature of structural repairs ought to be borne by capital. In *In re Gray* (1) the trustees in their discretion, exercised bona fide, had determined that the cost of substantial structural repairs should be paid for out of income, and both Tomlin J. in *In re Robins* (2) and Eve J. in *In re Whitaker* (3) agreed that the decision in *In re Gray* (1) was correct. The decision in *In re Robins* (2) is in no way inconsistent with what was decided in *In re Gray* (1), where trustees having determined to exercise their discretion in a particular way, the Court declined to interfere, while in *In re Robins* (2) the trustees came to the Court for guidance and submitted their discretion to the Court. In *In re Gray* (1) the necessity for the repairs was the result of several years of neglect to do ordinary repairs : here, in the natural course of carrying out ordinary repairs, defects in the structure were disclosed. In *In re Whitaker* (3), where the expenditure incurred in complying with requirements of the London County Council was ordered to be provided for out of capital, Eve J. said that in *In re Gray* (1) the expenditure was incurred

(1) [1927] 1 Ch. 242. (2) [1928] Ch. 721.
(3) [1929] 1 Ch. 662.

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in making good defects due to periodic neglect, while in *In re Robins* (1) structural reconstruction of a permanent nature was involved. True, the trustees might under s. 102 of the Settled Land Act, 1925, pay these expenses out of income, but they still have a discretion under s. 28 of the Law of Property Act, 1925, and may provide for them out of capital: see s. 84 and the Third Schedule of the Settled Land Act, 1925. The question is whether the expenditure here was upon ordinary repairs or on improvements. If the powers of the trustees to pay out of income or capital overlap, then they must do what seems most reasonable and just, and on the principles of *In re Hotchkys* (2), they ought to pay the expenses in question out of the corpus of the estate.

E. W. Lavington for the defendant grandchild representing the remaindermen. The expenses in question ought to be paid out of income. There is not sufficient evidence before the Court to enable it to say whether the repairs are improvements or ordinary repairs. Pulling down and rebuilding walls is not an "improvement" within the Third Schedule to the Settled Land Act, 1925: and, if the work does not come under the head of "improvements," it was done, not under the powers conferred by s. 84, but under the powers conferred by s. 102 of that Act: see sub-s. 2 (*b*); and the expenses should be paid out of income: see sub-s. 3.

CLAUSON J. [after stating the questions raised by the summons:] The circumstances are these: by Mr. Conquest's will he made provisions which result in this: that the plaintiffs, who are now the trustees of the will, are trustees for sale of, among other items of property, the houses to the repairs or alteration of which this summons relates. They are trustees for sale with a power to postpone the sale—which has been exercised—and it is in consequence of the exercise of that power to postpone that they are holding these houses and collecting the rents. It is under those circumstances that the problem as to repairs and structural alterations arises.

(1) [1928] Ch. 721. (2) 32 Ch. D. 408.

I have had represented before me as parties to this summons a number of persons who are interested in the income, who appear by Mr. Bischoff; and a representative of the corpus, who appears by Mr. Lavington. I understand that a large number of persons are interested in the corpus and I am asked to appoint Mr. Lavington's client to represent those persons; and I will do so.

In August, 1928, the plaintiffs, the trustees, put in hand general repairs to houses Nos. 12 to 17 Gordon Street; and in the course of those repairs it was ascertained that there were serious defects in houses Nos. 16 and 17, and also in another house No. 18, which for the moment apparently the trustees were not proposing to repair.

The trustees thereupon consulted with a firm of surveyors, who went into the whole matter with the district surveyor; and they advised the trustees that certain work should be carried out. That work has been carried out and the total amount expended has been 778*l.* 8*s.* That is made up in this way: general repairs to Nos. 12 to 17 Gordon Street, 50*l.* 17*s.* 6*d.*; pulling down the back walls of 16 and 17 Gordon Street to the level of the ground floor window heads, and rebuilding, cutting back party walls, and bonding into new work, and renewing defective roof timbers, 172*l.* 10*s.* 6*d.* As regards 18 Gordon Street, it has been necessary to pull down the back wall of the premises to the level of the ground floor window heads and to pull down the flank wall to foundation level and to rebuild in accordance with the requirements of the London County Council. It has also been necessary to renew the whole of the roof timbers and retile and provide new valley gutters and also to renew defective floor joists and sashes. The cost of that work was 555*l.*, no part of which, as the trustees have been advised, is referable to ordinary repairs. Accordingly the whole of the 727*l.* 10*s.* 6*d.* mentioned in the summons, which is made up of 172*l.* 10*s.* 6*d.* for structural repairs to 16 and 17 Gordon Street, and 555*l.* for structural repairs to 18 Gordon Street, is required for structural repairs. There is no question that the sum of 50*l.* 17*s.* 6*d.* which was expended on, what I

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may call, current ordinary repairs, ought to be paid out of income.

Now the work upon which this 727*l.* 10*s.* 6*d.* has been spent appears to me to be work of repair of the character of rebuilding. It may also, I think, be truly described as alterations in buildings reasonably necessary or proper to enable the buildings to be let. The trustees in their affidavit say: "It is necessary in order to enable the said premises to be let that the whole of the said repairs should be executed."

Now s. 28, sub-s. 1, of the Law of Property Act, 1925, conferred upon trustees for sale in relation to land and to the proceeds of sale all the powers of a tenant for life, and the trustees of a settlement under the Settled Land Act, 1925, including in relation to land the powers of management conferred by the Act during a minority. It is not, I think, disputed that the effect of that section is to give trustees for sale two sets of powers. One set is that which is referred to in the section by reference to minority. Those are powers which are set out in s. 102, sub-s. 2, of the Settled Land Act, 1925; and the expenses incurred in exercising those powers may by virtue of s. 28, sub-s. 1, of the Law of Property Act and s. 102 of the Settled Land Act, 1925, be met out of income. There are also conferred by the same section upon the trustees the powers which under s. 84 of the Settled Land Act, 1925, coupled with the provisions in the Third Schedule, a tenant for life can exercise, of making improvements and paying for them out of capital. Accordingly the effect of s. 28, sub-s. 1, of the Law of Property Act, 1925, is to confer power on the trustees to spend income for such purposes as are particularized in s. 102, sub-s. 2, of the Settled Land Act, and to spend capital for such purposes as are particularized in Part I. of the Third Schedule. It is suggested, and I think it is probably the fact, that those powers to some extent overlap: that you may have work—and it is suggested that the work in question in this particular case is of such a character—which the trustees could carry out under s. 102, under the power given to them to erect, pull down, rebuild and repair houses, and could under that

section pay for out of income, and which at the same time they could, under the first part of the Third Schedule, carry out and pay for out of capital. I do not, however, propose to consider whether the work in this particular case does or does not fall within the class of work which the trustees may pay for out of income. It is clear to me that it falls within the class of work which the trustees *may* pay for out of capital. It is, in fact, structural reconstruction: and I have the guidance of the course taken by Tomlin J. in the case of *In re Robins* (1), which has been referred to, a course approved and justified by Eve J. in the case of *In re Whitaker* (2), to which I have also been referred, for the view that expenditure on work of that character ought to be borne by capital. I see nothing in the particular circumstances of this case to induce me to take any other view, and the evidence I think is quite sufficient to justify the view that the work ought to be paid for out of capital, as the trustees undoubtedly have power so to pay for it; and as they are anxious for the guidance of the Court, I give that guidance by authorizing them to pay, as they have power to pay, for this work out of capital.

It is suggested that the order which I made in the case of *In re Gray* (3) would seem to indicate that some different order should be made in this case. I do not take that view. What I decided in *In re Gray* (3) was that the work in question in that particular case came within the expression "repair" in s. 102, sub-s. 2, cl. (*b*), of the Settled Land Act, 1925: and speaking from my own recollection of the case, supported by reference to the report in the Law Reports, I cannot help thinking that there can be no reasonable doubt that the work did come within the term "repair," and did not come within Part I. of the Third Schedule of the Settled Land Act, 1925, and accordingly was properly to be met out of income. I will only add this. In the judgment that I delivered in *In re Gray* (3) I indicated a certain view as to the general effect of the new legislation in the year 1925. Whether that

(1) [1928] Ch. 721. (2) [1929] 1 Ch. 662.
(3) [1927] 1 Ch. 242.

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view was right or wrong, my attention has now been drawn to the possibility that the powers given by the Acts to trustees to pay for certain works out of income and for certain works out of capital may sometimes overlap. Where in such a case, the trustees have a choice of powers, they may, I venture to think, be properly guided in their choice by the equitable principles laid down and applied in *In re Hotchkys.* (1) I hope that my language in *In re Gray* (2), in which I was not dealing with such a case, will not be construed as an authority for the contrary proposition.

In this particular case my order will be: to declare that the 727*l.* 10*s.* 6*d.* or thereabouts required to be expended for structural repairs may properly be raised by the trustees out of the corpus of the residuary estate, without any recoupment out of the income.

Solicitors: *Huntley, Son & Phillips.*

(1) 32 Ch. D. 408. (2) [1927] 1 Ch. 242.

H. C. H.

C. A.
1929
EVE J.
Feb. 20
C. A.
June 7

In re WILLIAMS' SETTLEMENT.

GREENWELL *v.* HUMPHRIES.

[1928. W. 3972.]

Settlement—Provision for future Marriage—Power of partial Revocation and new Appointment—Power to Wife to appoint Life Interest to any Husband who might survive her—Divorce and Remarriage of Wife—Exercise of Power in favour of second Husband—Wife again divorced and remarried—Death of Wife—Validity of Appointment.

Under a marriage settlement made in 1902 of property belonging to the wife, power was reserved to her in the event (which happened) of there being but one child of the then intended marriage, to revoke the trusts of the settlement as to three-quarters of the settled funds and to resettle the same for the benefit of any husband who might survive her, but so that he should not take more than a life interest therein, and any child or other issue of a future marriage. The wife, having been divorced, remarried in 1908, and exercised the power in favour of her second husband.

In 1923 the second marriage was dissolved upon the husband's petition, and the wife again remarried. She died in 1928, leaving her first, second and third husbands surviving her :—

Held, by the Court of Appeal (affirming the decision of Eve J.), that the second husband, although he survived his former wife, was not entitled to any interest under the appointment of 1908, as he had ceased to be her husband on the dissolution of the marriage.

In re Morrieson (1888) 40 Ch. D. 30 applied.

Bosworthick v. *Clegg* [1929] W. N. 133 approved.

Bullmore v. *Wynter* (1883) 22 Ch. D. 619 and *Duchess of Marlborough* v. *Duke of Marlborough* [1901] 1 Ch. 165 distinguished.

ORIGINATING SUMMONS.

Under a settlement dated April 21, 1902, and made in contemplation of the marriage shortly afterwards solemnised between H. J. C. Williams and Mary J. H. M. Lenders (then an infant) certain funds, reversionary interests and policies of assurance to which the wife was entitled were settled upon the usual trusts of a wife's fund, for the wife during her life and after her death for the issue of the marriage. In the event of a possible remarriage of the wife power was given to her, if there should be but one child of the then marriage, to revoke the trusts thereby given as to three-quarters of the settled property and to resettle the same for the benefit of any

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husband who might survive her, and any child or other issue of such future marriage, but so that any husband who might survive her should not take more than a life interest. Subject thereto the trust funds were to devolve as if no revocation and appointment had been made.

Mrs. Williams attained the age of twenty-one years on December 11, 1905, and executed a confirmation of the settlement on December 12, 1905. There was issue of the marriage one child only, a daughter, C. F. M. Williams, born on March 23, 1903.

Upon a petition presented by the husband the said marriage was dissolved in 1907 by a decree absolute of the Divorce Division, and on February 20, 1908, Mrs. Williams married the defendant, C. Humphries.

By a deed of appointment dated July 25, 1908, Mrs. Humphries, in exercise of the power contained in her marriage settlement, appointed that the trustees should hold three-quarters of the trust funds and property thereby settled upon trust after her death to pay the income thereof to her husband, the said defendant, during his life, and subject thereto upon trusts in favour of the children of her then present marriage.

The only child of the first marriage, C. F. M. Williams, was married to Henry Sly on April 26, 1922, and by a contemporaneous marriage settlement the share and interest to which she would become entitled under her mother's marriage settlement was duly settled. There was issue of this marriage one child, J. H. P. Sly, born on August 25, 1923.

Upon the petition of the husband the defendant, C. Humphries, the marriage between him and his wife was dissolved by a decree absolute of the Divorce Division dated October 29, 1923. On November 8, 1923, Mrs. Humphries married V. E. Elias.

Mrs. Elias died on July 23, 1928, intestate, leaving V. E. Elias her surviving, and without having exercised the power of appointment in the settlement in favour of the issue of her first marriage, contained in the settlement. She had no issue by either her second or her third marriage. The

trustees of the settlement of 1902 did not receive any notice of the appointment in favour of the defendant C. Humphries until after the death of Mrs. Elias.

The defendant C. Humphries having claimed to be entitled to a life interest in three-quarters of the settled funds as from the death of Mrs. Elias, the trustees of the settlement took out this summons to determine whether, in the events which had happened, the appointment of July 25, 1908, was valid and effectual.

The summons was heard before Eve J. on February 20, 1929.

F. Baden Fuller for the plaintiffs.

Jenkins K.C. and *B. A. Hall* for the defendant C. Humphries. This defendant was the husband of Mrs. Humphries, as she then was, at the date of the appointment in 1908, and survived her. He took a vested interest under that appointment, subject to the condition that he should survive, and it was not a necessary condition that he should still be her husband when he became entitled in possession: *Bullmore* v. *Wynter* (1), where a similar point was decided under a trust in a will "for any husband with whom she might intermarry, if he should survive her." *In re Morrieson* (2) is distinguishable. Under the words of the will in that case the gift was to "any wife"; there was no condition as to surviving; and it was held that the wife could take no interest unless she had the status of wife at the time when the gift took effect—i.e., her husband's death.

Once the donee of the power had appointed to her husband the power was duly exercised and at an end. It is sufficient that the defendant was a proper object of the power at the date of the appointment.

Such a power in a settlement gives a valuable asset to a wife as a consideration for what she may obtain under a settlement on a future marriage: *Saunders* v. *Shafto.* (3)

Sir Arthur Underhill for the trustees of the daughter Mrs. Sly's marriage settlement. The power was only intended to benefit a widower, and this lady left three men

(1) 22 Ch. D. 619. (2) 40 Ch. D. 30.
(3) [1905] 1 Ch. 126.

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who had been her husbands surviving her. But the only husband who survived her as such was Mr. Elias.

A man who has been divorced by his wife loses any estate by the curtesy he might have taken on her death under the law as it stood before 1926. The present case is covered by *In re Morrieson.* (1) The defendant Humphries having divorced his wife lost all right to take under the appointment.

EVE J. Under the settlement made on her marriage to a Mr. Williams in April, 1902, the lady who at the time of her death was Mrs. Elias had a power, in the event which happened, of there being but one child of that marriage, on the occasion and in contemplation of or after any future marriage, to withdraw from the trusts of the first marriage settlement three-fourths of the settled fund, and to appoint the same in favour of the issue of the second marriage and her husband. I had better read the exact words, which are to be found in clause 11 . . . . "in favour of the issue of the second marriage and her husband, but so that any husband who may survive her shall not take more than a life interest." In exercise of that power, shortly after her marriage to Mr. Charles Humphries in 1908, she did in fact purport to appoint to him as her husband a life interest in the three-fourths of the fund. In October, 1923, the second marriage was dissolved, and immediately afterwards Mrs. Humphries married the husband who has survived her, Mr. Elias, and the question is, she having made that appointment and not having revoked it, is the second husband, Mr. Humphries, entitled to the enjoyment of the life interest under the appointment?

To be so entitled he must I think fulfil two conditions. He must be her husband, and he must survive. It is conceded that he must survive in order to take any interest under the appointment, but it is argued on his behalf that so long as he was her husband at the time of the appointment and survives, he is entitled. I cannot so hold. I think that he ceased to be her husband on the dissolution of the marriage, and thereafter he could make no claim under the appointment.

H. L. L.

(1) 40 Ch. D. 30.

The defendant C. Humphries appealed. The appeal was heard on June 7, 1929.

Jenkins K.C. and *J. Leonard Stone* for the appellant repeated the arguments used in the Court below.

Galbraith K.C. and *Sir Arthur Underhill* for the trustees of Mrs. Sly's settlement and *F. Baden Fuller* for the trustees of the settlement of 1902 were not called upon to argue.

LORD HANWORTH M.R. stated the facts and continued. I think there is no doubt that Mrs. Humphries, as I will call this lady, when she made this appointment did intend to appoint in favour of C. Humphries for life. I think there is evidence of a clear intention on her part to do that, but the question is whether she had power to do it, and that depends upon the terms of the original settlement. Under that settlement a trust fund was created, by clause 8 a life interest was given to Mrs. Humphries, and by clause 11, which was applicable to the case of a subsequent marriage, power was given to her partially to revoke the declared trusts, and to appoint up to three-quarters of the trust funds (in the events which have happened of there being but one child of the first marriage) in favour of a future husband, and by the terms of the clause this appointed part of the settled funds after her death is to be held upon trust for the benefit "of any husband who may survive her," with the proviso that he is not to take more than a life interest in the same. It is claimed that Mr. Humphries is a husband who survived her, and so is entitled to the benefit of the appointment.

What was given to this lady was a power to appoint in a certain way and within certain limits. She was given the power to appoint a life interest to any husband who might survive her. The question to be decided is—do the words mean that the condition as to the donee of the power being her husband and surviving her must be fulfilled at the time when the power is exercised, or when the appointment takes effect? It seems to me quite clear that the latter is the true construction. The very object of the power was to give a benefit to a particular

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Lord Hanworth M.R.

person, and that was the person who filled the status of a husband and who survived her, if and when he survived her. He could not take until after her death, and it was then that the question arose as to who it was that could take. It seems to me clear that the settlement was not contemplating merely a husband when the appointment would be made, but a person who would fulfil both conditions when both conditions were capable of being fulfilled.

Now at the time when this appointment would have taken effect Mr. Humphries was no longer this lady's spouse; the marriage nexus had been broken. I think therefore that he does not fulfil the conditions under which the power to appoint was given. I agree with Eve J. and with the decision of Maugham J. in *Bosworthick* v. *Clegg* (1), and it seems that the same view was taken in *In re Morrieson* (2), a case of a will. There is a decision to a somewhat different effect in the case of *Bullmore* v. *Wynter* (3), but I think that case is distinguishable. There under a will there was a devise of property to the testator's daughter for life and after her death "in trust for any husband with whom she might intermarry, if he should survive her for his life," and that connoted any husband who might have married the daughter, if he should happen to survive her. I think the judgment of Eve J. was right, and the appeal must be dismissed.

LAWRENCE L.J. In my opinion this is a plain case. A person in order to be an object of the power of appointment must fulfil two conditions: (1.) he must survive the wife and (2.) he must be the husband of the wife at the time of her death. No person not fulfilling both of those conditions can take any interest under an appointment made under the power. In my judgment the status of husband is one of the controlling parts of the description of an object of the power.

We have been referred to several cases. In *In re Morrieson* (2) Kay J. had no hesitation in holding that under a gift to a wife of a deceased son a divorced wife could not

(1) [1929] W. N. 133. (2) 40 Ch. D. 30.
(3) 22 Ch. D. 619.

take because she was not at the moment of the son's death "in the station and position of a wife," and I think that this decision in substance covers the present case. *Bullmore* v. *Wynter* (1) and *Duchess of Marlborough* v. *Duke of Marlborough* (2) were, in my judgment, essentially different cases. In both the controlling qualification was not the status of the survivor, but the fact that there had been a marriage. Maugham J. in *Bosworthick* v. *Clegg* (3) in my opinion rightly followed the decision of Eve J. in the present case. I agree that the appeal should be dismissed.

RUSSELL L.J. I am of the same opinion. I think this gentleman is not an object of this power, because he could not be properly described as a husband of this lady who survived her.

Appeal dismissed.

Solicitors for appellant: *Charles Humphries & Co.*
Solicitors for respondents: *Greenwell & Co.* and *Whites & Co.*

(1) 22 Ch. D. 619. (2) [1901] 1 Ch. 165.
(3) [1929] W. N. 133.

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LUXMOORE J.

1929

May 28, 29, 30.

CLARK *v.* BARNES.

[1928. C. 3051.]

Vendor and Purchaser—Contract—Form of Conveyance—Implied Right of Way—Right appurtenant to Land—Previous User—Claim for Rectification of Conveyance—Express Exclusion of Implication of Grant of Right of Way—General Words—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 62.

The plaintiff at the date of the action was the owner in fee simple of certain plots of land in the village of C. in the county of Sussex, numbered on the Ordnance Survey Map 634, a portion of 635 and 636; also of a strip of land coloured brown on the plan on the conveyance to the plaintiff, leading from the plot 634 and part of 635 to the high road running from C. to a common. The defendant became in October, 1926, the owner of other plots, numbered 652, 653, 654 and 618 in the same parish.

The plaintiff had previously purchased the strip coloured brown in 1925, the parcels being as follows: "All that strip of land leading from W. Fields"—which were the plots 652 and 653—"to the high road running from the village of C. to . . . . C. common in the parish of P. . . . . "; the habendum being to the plaintiff in fee simple "to the use that the vendor his heirs and successors in title owner or owners . . . . of the hereditaments coloured red"—which were the plots 634, 653 and 652—". . . . shall have full right and liberty . . . . to pass and repass . . . . over and along the piece of land coloured brown on the said plan. . . . ." The plaintiff subsequently, in June, 1925, purchased at an auction sale the plots referred to above, 634, part of 635, 652 and 653; the defendant also bought the plots, numbers 618 and 654. The plots purchased by the plaintiff, being Lot 24 in the sale, were described as including a right of way for all purposes over the brown strip. By that purchase the plaintiff, having become the legal owner of the dominant and servient tenements, the right of way became merge d.

The plaintiff subsequently contracted to sell plots 653 and 652 to the defendant.

In the draft conveyance submitted to the plaintiff's solicitors by the defendant's solicitors, a right of way was inserted in favour of the purchaser (the defendant) over the plaintiff's land to the brown strip. This was struck out by the solicitors for the vendor (the plaintiff); and no grant was shown in the conveyance ultimately executed by the parties in October, 1926, of any right of way.

The plaintiff found later that the defendant was passing over a track in plot 634 in order to make use of the brown strip for the purpose of taking farm carts from his own land over the plaintiff's property to the high road; and that he claimed a right of way.

The plaintiff sought a declaration that the defendant was not entitled to any such right of way as he claimed, and further that the conveyance to the defendant of plots 652 and 653 might be rectified by the express

exclusion therefrom of any implied right of way which might arise under the provisions of the Law of Property Act, 1925, s. 62 :—

Held, that though the right to use the track was one reputed to be enjoyed with the land—that was plots 653 and 652—and to that extent the defendant was entitled to succeed, yet the plaintiff was entitled to have the conveyance rectified. The evidence showed that neither the plaintiff nor the defendant intended that any such right should pass on the conveyance of plots 653 and 652. The conveyance therefore would be rectified by the insertion therein of proper words limiting the implication of any right of way which might arise under the Law of Property Act, 1925, s. 62.

ACTION.

The plaintiff by his statement of claim sought a declaration that the defendant was not entitled under or by virtue of a conveyance on sale by the plaintiff to the defendant of certain land to a right of way over adjoining land of the plaintiff; and he further claimed if and so far as might be necessary, to have the conveyance of the land rectified by expressly excluding therefrom any implication arising under the Law of Property Act, 1925, s. 62, of the grant of any such right of way, by the insertion in the conveyance of proper words to that effect.

The following statement of facts is substantially taken from the judgment of the learned judge.

In the year 1920 the plaintiff, Major W. H. Clark, purchased certain property in the parish of West Chiltington in the county of Sussex. Subsequently he bought further pieces of land in the same parish, numbered 636 and part of 635 (which abutted on the north side of 636), and which were shown on the ordnance survey map for the parish of West Chiltington.

On June 16, 1925, the plaintiff bought from the Marquis of Abergavenny a strip of land coloured brown on the ordnance sheet, which strip was conveyed to him by an indenture dated June 16, 1925. The parcels in the conveyance were as follows: "All that strip of land leading from Windmill Fields"—these were the fields hereinafter mentioned and numbered 652 and 653—"to the high road running from the village of West Chiltington to West Chiltington Common situate in the parish of Pulborough in the county of Sussex and more particularly delineated in the plan drawn for the purpose of identification only and not of limitation on these

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presents and therein coloured brown "—and it was conveyed to " the purchaser in fee simple to the use that the vendor his heirs and successors in title owner or owners for the time being of the hereditaments coloured red on the said plan " —these were the plots numbered 634, 653 and 652—" and his and their tenants and all persons authorized by him or them shall have full right and liberty from time to time and at all times hereafter and for all purposes to pass and repass with or without horses cattle or other animals carts carriages motor cars and other vehicles laden or unladen over and along the said piece of land coloured brown on the said plan And subject to the said right of way to the use of the purchaser in fee simple." At the date of this conveyenace there was a tenant under Lord Abergavenny of the pieces of land, 634, part of 635, 652 and 653, and he had been tenant of those pieces of land for many years. On June 19, 1925, Lord Abergavenny's estate in the neighbourhood was put up for sale by auction in a number of lots, and at that sale certain pieces of land, numbers 634, part of 635, 652 and 653 comprised Lot 24, and the pieces of land numbers 618 and 654 comprised Lot 6. Lot 24 was described in the particulars of sale as including a right of way for all purposes over and along a roadway between the points approximately marked C and D on plan No. 1. Plan No. 1 was taken from the ordnance survey, and the road marked C–D on that plan was in fact the brown strip which was conveyed to the plaintiff by the indenture above referred to. This Lot 24 was purchased by the plaintiff. Lot 6 was bought by the defendant. At the date of the purchase the brown strip consisted of a metalled road, the metalled portion extending from the highway in an easterly direction to a point opposite the windmill which was shown on the ordnance map. The metalled surface continued over the adjoining part of the piece of land numbered 635, round the mill and into the mill yard, and also more or less up to the boundary of the plots 635 and 634. On the north side of the eastern boundary stood one or two gateposts which originally formed part of a gate, and on the south side of this gate stood

a stile, or the remains of a stile. From the site of this old gate, a cart track ran in an easterly direction to a gate which was erected on the boundary between plots 634 and 653. That boundary running from south to north consisted of a hazel hedge some 10 feet high, and a ditch. On the north side of the hazel hedge stood the gate last mentioned. The track referred to was a grass track and practically ceased to be visible as a track after it reached the gate. A footpath ran alongside this track from the old gate between plots 634 and 635, and this footpath continued in an easterly direction into the plot adjoining, the footpath then running in a northerly direction through the middle of plot No. 654 to a point where it joined what was described as a good metalled lane, which in its turn opened into a public road. The track was used by the tenant during the whole of his tenancy of the plots, numbers 634 and part of 635, 652 and 653, for the purposes of his farming operations.

The purchase of Lot 24 was completed on September 24, 1925, and the parcels were as follows: "All those pieces or parcels of land (with the stables outhouses and other buildings erected thereon or on some part thereof) situate in the parish of West Chiltington in the said County of Sussex known as 'Windmill Fields' containing by admeasurement eleven acres or thereabouts and more particularly described in the first schedule hereto and delineated in the plan drawn for the purpose of identification only and not of limitation on these presents and therein coloured pink Together with a right of way for the purchaser his heirs and assigns and his and their agents and all persons authorised by him or them (in common with all other persons entitled or to become entitled thereto) in all respects as a public highway may be used over the roadway between the points marked 'C' and 'D' on the said plan." Between the points "C" and "D" lay the piece of land shown on the ordnance map and coloured brown, and described by reference to the ordnance map, to the numbers 634, 653, 652 and part of 635. At the date of this conveyance, subject only to such rights as the tenant had under his lease, the right of way became merged,

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because the plaintiff became the legal owner of both the dominant and servient tenements.

Shortly before the purchase was completed, the plaintiff was anxious to sell parts of the property comprised in Lot 24, and after mentioning the matter to the tenant, he in fact approached the defendant with regard to the sale. On the evidence there was a dispute as to what happened. As a result of the interview between them, an agreement was drawn up by Major Clark in duplicate and executed by him. The two parts were then sent to the defendant, who in his turn signed each part. The agreement was in this form: "It is agreed between Mr. Walter Barnes and Major Hartley Clark, both of West Chiltington, that the former will purchase and the latter will sell for the sum of Two hundred and fifty pounds (250*l.*) those parcels of land forming part of the 'Windmill Fields,' and numbered on the Ordnance Survey Map, No. 653 (arable 7·483 acres) and No. 652 (wood, ·558 acres) approximately eight acres in all. The following special conditions of sale are agreed upon—(1). Completion shall be made on September 28, 1926, (2). Possession will be given on completion, (3) The hedge forming the north-west boundary of the land sold is not included in the sale but is retained by Major Hartley Clark, together with three feet along the south-east thereof, (4.) Mr. Walter Barnes agrees to pay such portion of the outgoing tenant's valuation as applies to the land purchased by him, (5.) Mr. Walter Barnes similarly agrees to bear a fair proportion of any compensation for disturbance awarded to the outgoing tenant. This agreement is binding upon both parties, their heirs, executors and assigns."

In due course, on or about September 4, 1926, the defendant's solicitors, Messrs. Mant & Staffurth, wrote to the plaintiff's solicitors, Messrs. Bowles & Stevens, asking for the abstract of title. This was sent on September 9, 1926, and on September 18, 1926, the defendant's solicitors sent a draft conveyance and a copy to the plaintiff's solicitors. The draft conveyance contained a grant of a right of way in these terms. After setting out the parcels and describing them, it continued:

"Together with a right of way for the purchaser his heirs and assigns, and his and their agents, and all persons authorised by him or them (in common with all other persons entitled or to become entitled thereto), in all respects as a public highway might be used over the roadway between points marked C and D on the said plan and continued over No. 634 on such plan." That was the plan referred to as a plan on the conveyance of September 24, 1925, from Lord Abergavenny and his trustees to the plaintiff. When the plaintiff's solicitors received that draft, Mr. Bowles, the member of the firm who attended to it, made a note on it on the first page: "A plan should be drawn on the conveyance," and he struck out all reference to any right of way, and he put the following side-note in red ink: "No mention is made in the contract of any right of way. The purchaser can obtain access from his own land." Subject however to his red ink alterations and to a satisfactory plan being supplied, he had no objection to the draft on behalf of the vendor. On September 18 Messrs. Bowles & Stevens wrote returning the draft conveyance to the defendant's solicitors, and they said this: "We think we must ask you to put a plan on the conveyance. If you will refer to clause 3 of the contract, you will, we think, agree that a plan is necessary. No mention whatever was made in the contract of a right of way, and our client cannot possibly agree to this." This alteration was accepted, the solicitors for the defendant writing on September 21, that they were returning the draft with plan. The draft was engrossed as altered and sent by the defendant's solicitors to the plaintiff's solicitors for execution by the plaintiff, and the conveyance was returned on October 8, 1926, duly executed by the plaintiff. The conveyance, after reciting that the plaintiff (the vendor) was entitled to the land hereinafter described and thereby conveyed for a legal estate in fee simple free from incumbrances and that he had agreed with the defendant (the purchaser) for the absolute sale to him of the said land for a like estate at the price of 250*l*., witnessed that in consideration, etc., the vendor as beneficial

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owner thereby conveyed unto the purchaser all the pieces or parcels of land situate in the parish of West Chiltington in the county of Sussex and being Nos. 653 and 652 on the ordnance map of such parish containing respectively 7·483 acres and ·558 acres coloured pink on the plan thereon, and (inter alia) conveyed to the vendor by the indenture dated September 24, 1925, to hold unto the purchaser in fee simple subject as in the said indenture of September 24, 1925, mentioned so far as the same conditions still applied. On September 29 the tenancy expired by effluxion of time, following the notice given by the plaintiff some time after he had made his purchase.

After the conveyance to the defendant, the defendant apparently used the track in question, but to what extent it was used was not very clear; the evidence was very scanty on the point, but there was no doubt that it was used to some extent. At the beginning of 1928, Major Clark saw the defendant's son using the track by driving a lorry along it to get access to No. 653, and he protested against this use. He said he had no objection to the user as a privilege, and so long as this was understood, he would not stop the defendant using it. The defendant's son stated in evidence that he answered this by saying that he understood that his father, the defendant, had bought the land—that is Nos. 652 and 653—so as to enable him to use the track. The plaintiff told him to look at the agreement. Shortly after this it appeared that the plaintiff again met the defendant's son using the track with the same lorry as before, and he objected to the user and said he would sue him for trespass. After this a correspondence began, and on February 27, 1928, the plaintiff's solicitors wrote to the defendant: "We have been instructed by Major Hartley Clark to write to you with respect to your trespassing on his property at West Chiltington. You will ascertain by referring to the conveyance to you dated October 8, 1926, that no right of way was granted when you purchased land from Major Hartley Clark. Our client does not wish to adopt an unneighbourly attitude but he cannot of course

allow you to acquire a right of way over his land by user. He is, without prejudice, prepared to allow you access to your land over his, provided that you sign an agreement and pay a nominal rent. Such agreement would be determinable by the owner at seven days' notice, and would provide for your paying a fair proportion of the expense of keeping the roadway in repair." There was apparently no answer to that letter. On March 27 the plaintiff's solicitors again wrote to the defendant: "Referring to our letter to you of February 27, last, we have heard again from Major Hartley Clark that you are still using the road and thereby continuing the trespass referred to in our previous letter. As we pointed out to you our client does not wish to be unneighbourly, but if you wish to use the road our client must ask you to sign an agreement and pay a nominal rental as already suggested by us. If you do not write signifying your consent to this arrangement within seven days, we shall advise our client to lock the gate at the end of the road to prevent your using the way, and if this is not effective, Major Hartley Clark will have to obtain an injunction to restrain you from using the road at all. We wish to point out that our client has no wish to resort to any stringent measure, and we hope that you will see the reasonableness of the suggestion which has been made so that the matter can be amicably settled."

There was no reply to that letter. On April 21 the defendant's solicitors wrote to the plaintiff's solicitors. From a letter of April 13 it appeared that there must have been some meeting between the plaintiff's and the defendant's solicitors, at which the plaintiff's solicitors had raised the question about Mr. Barnes and what he had been doing, because on April 13, before the letter of April 21 was written, a member of the defendant's solicitors' firm wrote to the plaintiff's solicitors: "I have written to Mr. Barnes in this matter and expect to see him any day, when I will write you further." On April 21 a further letter was written: "Mr. Barnes has consulted us with reference to the threat to stop the right of way on to his land purchased by him from your client. Mr. Barnes points out that unless he can

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use the roadway, the land is no use to him, and he had no idea that any objection would be raised to his doing so. We think he is justified in assuming that he had a right to this inasmuch as since his purchase of the land nearly eighteen months ago, no objection has been taken by your client to his doing so. We certainly find that no mention of the right is put into the contract which was apparently drawn up between our respective clients, and also that you struck this out of the draft conveyance. Unfortunately, we apparently omitted to inform Mr. Barnes of this deletion, but it is quite clear that he understood he could use this way, which is the only way into the field. Mr. Barnes points out that if he is expected to make an entrance from his own land, it would be a considerable undertaking and would of course detract from the value of the land. Under the circumstances we hope that this matter will be amicably settled, as we feel more or less at fault in not consulting our client before passing this question, but we certainly assumed that this had been agreed between the parties and was not mentioned in the contract. Mr. Barnes strongly objects to having any separate agreement subject to short notice to terminate and the payment of a rent. If your client cannot agree to Mr. Barnes using the road, is he prepared to take the land back from Mr. Barnes at the price he paid for it ? Our client feels so strongly on this matter that he states he intends to take very definite action should the right of way be stopped." That letter was answered on April 26 by the plaintiff's solicitors : " We have now heard from our client on this matter. He states that he sold the land to your client on more favourable terms than he would have done to any one else because there was no need to sell a right of way with it to him. He has not previously raised any objection because he thought that your client realised that he was using the road only as a privilege and not as a right. We must insist on your client signing an agreement to pay a nominal rental within seven days. Unless he does this we are instructed to apply for an injunction. We cannot at all understand the threat contained in your letter. Our client wishes to meet Mr. Barnes reasonably and we submit

he is doing so." The correspondence continues for some time, and on July 13, the defendant still insisting on his right to use this track, the writ was issued and the action was begun.

G. D. Johnston for the plaintiff. The defendant is not entitled to a right of way over the plaintiff's land; there was no agreement for any such grant. The Law of Property Act, 1925, s. 62, cannot apply (1); it only applies to conveyances, not to contracts: see sub-s. 4. The vendor is entitled to have words inserted in the conveyance limiting the implication of any part of a right of way and to have the deed rectified accordingly: see *In re Peck and the School Board for London.* (2) There is no easement, right or advantage occupied or enjoyed with the land sold to the defendant: *In re Walmsley and Shaw's Contract.* (3) The conveyance should be rectified: *Stait* v. *Fenner* (4); the contract shows the intention of the parties.

H. H. King for the defendant. By virtue of the general words in the Law of Property Act, 1925, s. 62, the defendant is entitled to a right of way over the adjoining land of the plaintiff for the purposes of the user of the land purchased from the plaintiff: see *International Tea Stores Co.* v. *Hobbs* (5) and *Hansford* v. *Jago.* (6) The wording of the conveyance does not contain anything to negative the implication of the words contained in s. 62: *Gregg* v. *Richards.* (7) *In re Peck and the School Board for London* (8) cannot apply to the case here; the facts are very different; nor can the

(1) Law of Property Act, 1925, s. 62, sub-s. 1: "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

Sub-s. 4: "This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained."

(2) [1893] 2 Ch. 315, 318.
(3) [1917] 1 Ch. 93.
(4) [1912] 2 Ch. 504, 518.
(5) [1903] 2 Ch. 165.
(6) [1921] 1 Ch. 322.
(7) [1926] Ch. 521.
(8) [1893] 2 Ch. 315.

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case of *Barkshire* v. *Grubb*, (1) referred to in *In re Peck and the School Board for London*. (2) There has always been a means of access to the land now belonging to the defendant over the adjoining land of the plaintiff, and it passes as "a right . . . . occupied or enjoyed with" the land conveyed.

No fraud has been alleged against the defendant and none exists, and the plaintiff cannot claim to have the conveyance rectified on the ground of mistake: *May* v. *Platt*. (3) The change in the character of the land—namely, from arable to market gardens—has made the difference from the point of view of the plaintiff. The defendant is further entitled to rely on the plaintiff's laches and acquiescence in the defendant's acts.

The plaintiff is entitled to have the conveyance rectified to give effect to that which is omitted from the contract; but it is submitted that what he is claiming is further than the decided cases have gone and cannot be supported.

In effect the evidence has shown that there always has been an apparent user attached to plot 653; the existence of a physically defined way is sufficient for my purpose.

G. D. Johnston in reply.

May 30. LUXMOORE J. The plaintiff in this action is William Hartley Clark, who is the owner of certain property in the parish of West Chiltington in the county of Sussex, and which comprises certain pieces of land, Nos. 634, part of 635, and 636, shown on the Ordnance Survey Map, sheet 36.8.S.E. for the county of Sussex. He also owns a strip of land leading from the pieces of land, 634 and part of 635, to the high road running from the village of West Chiltington to West Chiltington common, this is coloured brown on the ordnance sheet. The defendant, Walter Barnes, is the owner of other pieces of land in the same parish, Nos. 652, 653, 654, and 618, on the same ordnance sheet, as well as additional land in the parish of West Chiltington. By his statement of claim the plaintiff claims, first, a declaration that the defendant is not entitled to any right of way over the pieces of land

(1) (1881) 18 Ch. D. 616. (2) [1893] 2 Ch. 315.
(3) [1900] 1 Ch. 616, 621.

634 and part of 635, leading to the strip coloured brown, either under or by virtue of the conveyance under which he conveyed the pieces of land, Nos. 652 and 653, to the defendant or otherwise; and, secondly, he claims to have the conveyance in question rectified by the express exclusion of the implication of the grant of any right of way by reason of the provisions of the Law of Property Act, 1925, s. 62.

The facts, so far as the physical features of the land and the actual conveyance are material, are not really in dispute. [His Lordship stated the facts as substantially set out above.] Now what is the position under the conveyance? First of all it is clear that the contract of September 15, 1925, did not include any express agreement to grant a right of way, and consequently such contract only operated to pass such easements as were legally appurtenant to the land agreed to be sold. There were in fact none. The whole of the land was in the ownership of the plaintiff. There is no express stipulation in the contract which will entitle the purchaser to have conveyed to him any privileges and advantages which were used by the vendor in connection with the land sold, over other adjoining land to his own, which are not necessary to the enjoyment of the property. I think the law on this point is clear. It is stated in practically the same terms as I have already used, in Williams on Vendors and Purchasers, 3rd ed., p. 600, and is, I think, supported by *In re Peck and the School Board for London* (1), which was cited in the argument.

The position is different with regard to the conveyance. Under the Law of Property Act, 1925, s. 62, certain matters are, unless the section is excluded, to be implied in every conveyance. The section provides that: "(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land"—I will leave out immaterial words—"all . . . . ways, ... liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part

(1) [1893] 2 Ch. 315.

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or parcel of or appurtenant to the land or any part thereof"; and that provision is to apply (sub-s. 4) ". . . . only if and as far as a contrary intention is not expressed in the conveyance, ..." The conveyance as executed does not exclude the operation of the section in question. It therefore operates to grant to the purchaser, as a legal incident, any privilege which was reputed to exist or which was in fact being enjoyed with the property conveyed at the time of the conveyance. At the actual date of the conveyance, which was October 8, 1926, there was in fact no use of this track, as the tenant had in fact given up possession on September 29. But I think on the evidence before me, I am bound to hold, as in fact I do hold, that a right to use the track was then reputed to be enjoyed with the land—i.e., with plots 652 and 653, the property sold to the defendant —and on this ground I think that, apart from the question of rectification, the conveyance of October 8, 1926, in fact carries with it and confers on the purchaser the right to use the track for the purpose of getting access to and from plots 652 and 653, from the high road, and over the ground for ordinary agricultural purposes.

That being so, the plaintiff would fail with regard to the declaration that he seeks, so far as the conveyance itself is concerned, and therefore it is necessary to consider the second question which is raised in the action; and that is the question whether the plaintiff is entitled to rectification of the conveyance or not. That depends on whether there has been a mutual mistake between the parties in the terms in which the conveyance has been executed. As I have already pointed out, the contract itself does not include any provision which will entitle the defendant to claim to have such a right of way as he claims, granted to him. The question then is, is the plaintiff entitled to have words inserted in the deed of conveyance, to limit the operation of the Law of Property Act, 1925, s. 62; and to prevent the grant of such a right of way by implication? It is plain that if this point had been raised before the conveyance had been executed and the court had been asked to determine what

the form of the conveyance would be, such a limitation would undoubtedly have been inserted, and on this ground the plaintiff is entitled to have the conveyance rectified. Further I am satisfied that it was not intended to grant any such right of way. This conclusion depends entirely on the view which I have taken of the evidence of what happened when the agreement was entered into. There is, as I said before, a conflict with regard to it, and therefore it is necessary to consider the evidence carefully before coming to a conclusion. Major Clark is quite clear in his evidence with regard to what happened. He said that he went to see the defendant shortly after he bought the land and before it was conveyed to him (the plaintiff) to ask him if he would care to buy the arable portion of numbers 634, 653 and 652; and it was agreed that the land, 652 and 653, should be sold to the defendant for 250*l*. The plaintiff said that the defendant told him that he was short of money, that he could not pay immediately, but that if the plaintiff could wait until Michaelmas, September, 1926, he would be glad to have the land joined with his own; he also pointed out at the time that he had access to his own land and he would not require a right of way over the plaintiff's land, plot 634, past the windmill into the main road. The plaintiff has said that that was one of the arguments which induced him to wait a year for the money, which he actually wanted at the time. In cross-examination he was asked whether his recollection was quite clear as to the conversation about the right of way not being required, and he said, in answer to Mr. H. H. King, that the defendant distinctly said that he (the defendant) would not require the use of the right of way.

The defendant's version on this point is entirely at variance with Major Clark's. He said that it was vital to him to get the right of way, that he was really only buying the land in order that he might get the right of way to the high road over his other land. He said that no one ever mentioned the right of way at all, no one said anything about it, he did not ask in any way for the postponement of the completion of the purchase, in fact he thought he was going to get it before

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September, 1926. He said afterwards that was a mistake. It is very difficult to accept his evidence, because it is clear from Major Clark's evidence that he was very anxious that there should not be a right of way past the windows of what he in fact used from time to time as a residence. The defendant's evidence was that though he was anxious that he should get the right of way, yet no one said anything at all about any such right of way. Major Clark is quite positive that the right of way was discussed and that the defendant said he would not require it. I am not suggesting that the defendant has been telling an untruth, but he is an old man, seventy-eight years of age next month. The transaction in question took place four years ago, and it is obvious, from other things that he said in his evidence, that his memory is defective with regard to what happened. I accept the plaintiff's story that this question of the right of way was discussed, and that it was in fact understood between them and agreed that there should be no right of way over plot 634 and the strip in question.

In those circumstances I think the plaintiff is entitled to succeed in his claim to have the conveyance rectified by the insertion of proper words to prevent the implication of a right of way under the Law of Property Act, 1925, s. 62.

I think the conveyance should be rectified by inserting therein immediately before the acknowledgment of the purchaser's right to production of the deeds, the words which appear in para. 2 of the prayer of the statement of claim: "provided that any implication of a right of way for the purchaser from the north-west corner of the property hereby conveyed over and across the adjoining land of the vendor (being the parcels, numbered 634 and 635 and the strip leading thence to the highway) is hereby expressly excluded."

The result is that the plaintiff succeeds in the action and the defendant must pay the plaintiff's costs.

Solicitors: *Petch & Co., for Bowles & Stevens, Worthing; Palmer, Bull & Co., for Mant & Staffurth, Petworth.*

A. R. T.

In re ROBERTS AND COOPER, LIMITED.

EVE J.
1929
June 24.

[00468 of 1928.]

Company—Winding Up—Rights of preference Shareholders—Arrears of preference Dividends "due thereon" at Date of Winding Up—No Dividends declared during Period of Arrear—No Arrears payable.

The memorandum of association of a company provided that in the event of a winding up the preference shareholders should be entitled to receive in full out of the assets the amount of capital paid up on their shares, and also all arrears of dividend due thereon at the date of winding up. A resolution was passed for the winding up of the company in April, 1925, at which date no dividends on the preference shares had been declared or paid for over four years past. After the winding up there was a surplus sufficient to pay arrears of dividend due:—

Held, that no dividends having been declared between 1921 and 1925, none were due, and the preference shareholders were not entitled to be paid anything in respect of arrears.

In re New Chinese Antimony Co., Ld. [1916] 2 Ch. 115 and *In re Springbok Agricultural Estates, Ld.* [1920] 1 Ch. 563 distinguished.

ORIGINATING SUMMONS in the winding up of the company.

Roberts & Cooper, Ld. (hereinafter called "the company"), was incorporated on December 29, 1911, as a private company under the Companies (Consolidation) Act, 1908.

The capital of the company was 112,000*l.* divided into 11,100 shares of 10*l.* each, and 1000 shares of 1*l.* each. Of the 10*l.* shares, 4000 were A preference shares, 4000 B preference shares, and the remainder ordinary shares. The 1*l.* shares were employees' shares. By the memorandum of association the holders of the A and B preference shares were entitled to receive out of the profits of the company available for distribution a fixed cumulative preference dividend of 4*l.* per cent. per annum, the holders of A preference shares having priority over the holders of the B preference shares in respect as well of arrears of dividend as of current dividend.

Clause 6, sub-clause 2, of the memorandum provided as follows:—

"The holders of the A and B preference shares shall in the event of the winding up of the company be entitled to receive in full out of the assets of the company the amounts paid up or credited as paid up on such A and B preference shares together with any arrears of dividend due thereon at the

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date of the winding up in priority to the claims of the holders of any of the other shares of the company to be paid any amount in respect of such last mentioned shares, and so that as between the holders of A preference shares and B preference shares the holders of the A preference shares shall be entitled to receive in full all capital and arrears of dividend before the holders of the B preference shares shall be entitled to receive anything.

(3.) Save as aforesaid the holders of the A and B preference shares shall not be entitled to any claim upon the assets of the company."

The employees' shares ranked for dividend as if they were ordinary shares of 10*l.* each, so long as they were held by employees of the company; but did not confer any right to vote or attend general meetings, or any other rights or privileges in connection with the company.

By art. 138 it was provided that if the company should be wound up the assets available for distribution among the members were to be applied in paying to the holders of the A and B preference shares in accordance with their priorities the arrears of dividends and capital to which they were entitled and in the next place in payment of the capital paid up on the ordinary shares, and the employees' shares rateably, the excess (if any) to be distributed among the holders of the ordinary shares in proportion to the amount of capital paid up or which ought to have been paid up at the commencement of the winding up.

At an extraordinary general meeting of the holders of A preference shares held on October 25, 1921, a resolution was duly passed to increase the rate of interest on the A and B preference shares from 4 to 5 per cent. per annum and confirming any prior payment of dividend to the holders of A and B preference shares at the higher rate. The resolution was also passed at meetings of the holders of B preference shares and ordinary shares. The company was prosperous and dividends were regularly paid on the A and B preference shares until the period ending March 31, 1921. From the year 1920 until 1925, when it was wound up, however, the

company made a loss in every year and no dividends were paid or declared on the A or B preference shares in respect of any period subsequent to March 31, 1921. At extraordinary general meetings of the company held on April 9 and April 24, 1925, special resolutions were duly passed and confirmed for the voluntary winding up of the company, and J. H. Gough was appointed liquidator. During the liquidation all the creditors of the company were duly paid, and 10*l.* per share returned to each of the holders of A preference shares, and 7*l.* 17*s.* 6*d.* per share to each of the holders of B preference shares. After making these payments and realizing certain other assets of the company it was estimated that there would be a surplus of 10,000*l.* available for distribution among the shareholders.

The summons was issued by the liquidator to determine whether, upon the true construction of the memorandum and articles of association, the applicant should, after payment of the company's creditors, pay first to the holders of the A preference shares in addition to the amounts credited as paid up thereon a further sum representing four years' arrears of dividends at the rate of 5 per cent. per annum or any and what further sum, and pay next to the holders of the B preference shares in addition to the amounts credited as paid up thereon such further sum representing four years' arrears of dividends thereon at the rate of 5 per cent. per annum or any and what further sum, and if any such further sums were payable whether the applicant ought to deduct income tax therefrom, and if so whether such income tax should be retained or paid to the Commissioners of Inland Revenue.

B. S. Tatham for the liquidator.

Cecil Turner for the A and B preference shareholders. The preference dividends have been in arrear and unpaid for four years, and the A and B preference shareholders are entitled in succession to be paid their arrears in priority to any distribution among the ordinary shareholders : *In re W. J. Hall & Co., Ld.* (1) ; *In re New*

(1) [1909] 1 Ch. 521.

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Chinese Antimony Co., Ld. (1); *In re Springbok Agricultural Estates, Ld.* (2)

A question may arise as to whether any income tax is payable on these arrears, and the liquidator should deduct and retain the tax from the arrears payable to the A preference shareholders, which might ultimately make a larger sum available for the B preference shareholders.

Bischoff for the ordinary shareholders. No dividends have been declared upon these shares since payment ceased, and therefore none are "due" within the meaning of the clause. It is only dividends that are "due" that can be in arrear, therefore the preference shareholders are only entitled to the return of their capital: *Bond* v. *Barrow Hœmatite Steel Co.* (3); *In re Severn and Wye and Severn Bridge Ry. Co.* (4)

EVE J. In my opinion the preference shareholders are not entitled to any arrears of dividends between March 31, 1921, and the date of the winding up. The language I have to deal with is substantially different from that used in the cases cited by counsel on their behalf. The company suspended payment of preferential dividends after March 31, 1921, and although it was possessed of reserves which could have been made available for such dividends, for reasons which no doubt were sufficient, these reserves were not so applied. If the company had declared the dividends, they would have been "due." No dividends having been declared, none had become "due." I think this case is distinguishable from those cited by the presence of the word "due." In the circumstances there were no arrears due to the preference shareholders at the date of the winding up, and they are not now entitled to anything for arrears of dividends out of the surplus assets. As no amount is payable, the question raised with regard to deduction of income tax does not arise.

Solicitors: *E. Flux, Leadbitter & Neighbour, for Slater & Camm, Dudley.*

(1) [1916] 2 Ch. 115.
(2) [1920] 1 Ch. 563.
(3) [1920] 1 Ch. 353.
(4) [1896] 1 Ch. 559.

H. L. L.

EVE J.
1929
July 1.

In re DOMINION TAR AND CHEMICAL COMPANY, LIMITED.

[00114 of 1929.]

Company—Voluntary Winding Up—Fixed cumulative preference Shares—Surplus Assets—Arrears of preference Dividend—Payment by Liquidator—No Deduction of Income Tax.

Where upon the winding up of a company the preference shareholders are entitled to payment of all arrears of dividend, and there is a fund available for payment, they are entitled to receive the full amount of the dividends in arrear without any deduction of income tax, in priority to any payment to the ordinary shareholders.

SUMMONS in a winding up.

The summons raised the question whether, in distributing the assets of the Company and in paying the arrears of preference dividends, the liquidator ought to deduct income tax on such arrears, and, if so, at what rate.

The Dominion Tar and Chemical Company, Ld., was incorporated in February, 1903, with a nominal capital of 30,007*l.* in 1*l.* shares, which was subsequently increased from time to time.

At an extraordinary general meeting of the Company, held on April 15, 1924, it was resolved to increase the capital of the Company to 750,000*l.* by the creation of 450,000 new shares of 1*l.* each, of which 150,000 were to be ordinary shares, and the remainder preference shares. The resolution provided that the holders of the preference shares should be entitled to a fixed cumulative preference dividend at 7 per cent. a year and should in a winding up be entitled to priority as to return of capital and to payment of all arrears of the dividend whether earned or declared or not down to the beginning of the winding up over all other shares in the capital for the time being of the Company, but not to any further or other rights. Subject thereto any surplus assets were to go to the ordinary shareholders.

On February 4 and February 19, 1929, special resolutions for the winding up of the Company were passed and confirmed. The liquidator had got in and realized the assets which, after

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providing for all the creditors and the costs of liquidation, were sufficient to repay the capital paid up on the preference shares and all arrears of dividend and leave a sum for distribution among the ordinary shareholders equal to three and a half times the amount paid at or credited as paid up on the ordinary shares. The sum represented the balance obtained on the sale of the undertaking to a Canadian company. The last dividend on the preference shares was paid on November 1, 1928, and the dividend was, therefore, in arrear until February 19, 1929, when the liquidation began. All income tax on the profits had been paid.

Wynn Parry for the liquidator.

Lionel Cohen K.C. and *Divine* for the preference shareholders. No income tax is now payable, therefore the preference shareholders are entitled to the full arrears of their dividends without any deduction. The assets have ceased to be profits or income and have become capital. The point appears to be open, but it was referred to in the argument in *Commissioners of Inland Revenue* v. *Wright* (1); see Dowell's Income Tax Laws, 9th ed., p. 36; *Commissioners of Inland Revenue* v. *Burrell.* (2)

J. W. F. Beaumont for the ordinary shareholders. I admit no income tax is payable, because it has already been paid. But it ought to be deducted from the arrears of dividend now payable to the ordinary shareholders. The preference shareholders should not get an advantage at the expense of the ordinary shareholders merely because they do not get their dividend at the moment when it is due. They are only entitled to such interest as they would have received, if the Company had not gone into liquidation, but was still a going concern: *In re New Chinese Antimony Co., Ld.* (3); *In re Springbok Agricultural Estates, Ld.* (4)

EVE J. I think that the judgments of Neville J. in the *New Chinese Antimony Co., Ld.* (3), and of P. O. Lawrence J.

(1) [1927] 1 K. B. 333.
(2) [1924] 2 K. B. 52.
(3) [1916] 2 Ch. 115.
(4) [1920] 1 Ch. 563.

in *In re Springbok Agricultural Estates, Ld.* (1), indicate that in their opinion the real sum payable to the preference shareholders under clauses not distinguishable from the one which I have to construe was the full amount of the preferential dividend without any reference to the question whether the distributable fund represented any reserve of profits or surplus profits earned by the Company, and without any obligation on the liquidator to deduct from the dividend so paid the amount of the income tax. In other words, it seems to me that the construction which they have put upon the words, " all arrears of the said preferential dividend," was not arrears of such sums as the preference shareholders would have received had the Company been a going concern—had the Company earned profits available for the preferential dividend and had they in fact declared their dividend—but all arrears of the interest payable to the preference shareholders at the rate fixed by the contract between them and the Company, and that in truth and in substance the expression " all arrears of the said preferential dividend " in a clause of this sort means a sum equal to the amount secured as preferential dividend to the shareholders by the contracts under which the preference shares were issued. In my opinion an obligation, which the preference shareholders would be under in one set of circumstances, cannot be imposed on them by the Court in a different state of circumstances, and I think on these grounds, fortified by the decisions to which I have referred, the preference shareholders in this case are entitled to their full 7 per cent. dividend before the surplus assets are applied in making further payment to the ordinary shareholders.

Solicitors: *G. & G. Keith.*

(1) [1920] 1 Ch. 563.

H. L. L.

EVE J.
1929
July 2.

MANCHESTER CORPORATION *v.* BUTTLE.

[1929. M. 659.]

Water—Supply—Domestic Purposes—Supply to Dentist—Use of Part of Dwelling-house for Trade or Business—Manchester Corporation Waterworks Act, 1847 (10 & 11 *Vict. c. cciii.*), *ss.* 93, 111—*Manchester Corporation Waterworks and Improvement Act*, 1869 (32 & 33 *Vict. c. cxvii.*), *s.* 16.

Under s. 16 of the Manchester Corporation Waterworks and Improvement Act, 1869, no person is entitled to require, nor is the corporation bound to supply, any dwelling-house in the borough with water (otherwise than by meter or special agreement) where any part of such dwelling-house is used for any trade or business purposes:—

Held, that the residence of a dentist where he practised the profession of dentistry was a dwelling-house used in part for business purposes, and therefore the corporation was entitled to demand and be paid an annual sum in addition to the ordinary domestic and public water rates charged in respect of dwelling-houses not so used, although the water supplied was used for domestic purposes within the meaning of a local Act of 1847.

ACTION.

The plaintiffs, in accordance with their statutory powers, supplied water to the defendant, who resided at 164 Stockport Road, Levenshulme, Manchester, and practised his profession of a dentist both at his residence and at other addresses in Manchester. They brought this action claiming declarations that the water supplied to the defendant's residence for use at his dental chair was used for other than domestic purposes, and that they were not bound to supply any water to it except under a special agreement or by meter.

By the Manchester Corporation Waterworks Act, 1847 (10 & 11 Vict. c. cciii.), s. 93, it was enacted that the Mayor, Aldermen and Burgesses should, at the request of the owner or occupier, furnish to every occupier of a private dwelling-house or part of a dwelling-house within fifty yards of any main or other water pipe of the corporation a sufficient supply of water for the domestic use of every such occupier at a rate per cent. per annum not exceeding 5*l.* upon the annual rack rent or value of the premises so supplied with water.

By s. 96 it should be lawful for the Mayor, Aldermen and Burgesses to supply any person with water for other than

domestic purposes, at such rent and upon such terms as should be agreed between the corporation and the person desirous of having such supply of water.

By s. 111, in order to raise a sum of money sufficient to defray the costs, charges and expenses of supplying the borough with water, it should be lawful for the council, once in every year, to cause a rate to be called " the domestic water rate " to be made and levied upon the occupiers of all dwelling-houses and shops and buildings used as dwelling-houses, according to the full net annual value thereof, and in like manner, once in every year, to cause a rate to be called " the public water rate " to be made and levied upon the owners of all dwelling-houses, shops, warehouses, counting-houses, coach-houses, stables, cellars, vaults, buildings, workshops, mills and manufactories, etc., and of all hereditaments within the borough (except as thereinafter mentioned) according to the net annual value thereof, the said rates to be collected and paid by yearly, half-yearly, or quarterly payments.

By the Manchester Corporation Waterworks Act, 1854 (17 Vict. c. xxxviii.), s. 8, Levenshulme and other places were included within the limits of the supply of water under the Act of 1847, and all persons within the extended limits of supply were made subject to both Acts.

The Manchester Corporation Waterworks and Improvement Act, 1869 (32 & 33 Vict. c. cxvii.), provided by s. 16 that no person should be entitled to require nor should the corporation be bound to supply, any dwelling-house with water (otherwise than by meter or by special agreement) where any part of such dwelling-house was used for any trade or business purposes.

By the Manchester Corporation Act, 1909 (9 Edw. 7, c. lvii.), s. 26, the boundaries of the city were altered so as to include the urban district of Levenshulme.

The plaintiffs alleged that they had offered to supply water to the defendant's dwelling-house upon payment by him of a sum per annum inclusive of the " domestic water rate " and " public water rate," and a further sum of 12*s.* 6*d.*, but the defendant had refused to make any payment to the plaintiffs

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other than the aforesaid "domestic water rate" and "public water rate."

Farwell K.C. and *W. Gorman* for the plaintiffs. The corporation are not bound to supply the defendant with any water otherwise than by meter or by special agreement, as he occupies a dwelling-house part of which is used for "trade or business" purposes, within s. 16 of the Manchester Corporation Waterworks and Improvement Act, 1869. The practice of dentistry, though it may not be a "trade," is a "business," a word of much wider meaning than "trade": *Rolls* v. *Miller*. (1) In *Smith* v. *Anderson* (2) Jessel M.R. said that anything which occupied the time and attention and labour of a man for the purpose of profit was a business. The word "business" includes any professional occupation such as that of a dentist, and it makes no difference whether any water is used in connection with the business or not, though undoubtedly water is constantly used at the dentist's chair. In *Frederick* v. *Bognor Water Co.* (3) the words of the special Act differed from those in the present case, being "used for any business for which water is required," and that case has no application.

Secondly, it is submitted that the water supplied to the defendant for use at his dentist's chair is supplied for other than domestic purposes, and s. 93 of the Manchester Corporation Waterworks Act, 1847, does not apply: *Colley's Patents, Ld.* v. *Metropolitan Water Board* (4); *In re A Debtor*. (5)

Gover K.C. and *Hugh E. Kingdon* for the defendant. Taking the second point on the Act of 1847 first, it cannot be said that the water supplied to the defendant is supplied for any other than domestic purposes. The case is covered by the decisions in *Metropolitan Water Board* v. *Avery* (6) and *Oddenino* v. *Metropolitan Water Board*. (7)

Secondly, the defendant's house is not used for any trade or business purposes. A dentist carries on a profession, and

(1) (1884) 27 Ch. D. 71.
(2) (1880) 15 Ch. D. 247, 258.
(3) [1909] 1 Ch. 149.
(4) [1912] A. C. 24.
(5) [1927] 1 Ch. 97.
(6) [1914] A. C. 118.
(7) [1914] 2 Ch. 734.

assuming that the word "business" generally includes a profession, its association with the word "trade" in s. 16 of the Act of 1869 shows that it must be read ejusdem generis with trade. Sect. 15, which imposes penalties upon persons using water laid on to a dwelling-house for the purpose of obtaining power for working machinery, shows what was the real object of ss. 15 and 16. If the construction contended for by the plaintiffs is correct, then the corporation is not bound to supply any water at all to a householder who lives over his shop, though every house and building used as a dwelling-house is subject to a flat water rate under s. 111 of the Act of 1847. The corporation could refuse to supply such a house with water, except upon their own terms.

There are only two sections in the Act of 1869 which deal with water supply, and these sections are more or less correlative, and the trade or business purposes referred to in them are those referred to in s. 15, i.e., supply of power to machinery.

Alternatively, trade or business purposes must be confined to trade purposes of a non-domestic character.

EVE J. The plaintiffs in this case are the undertakers and owners of the waterworks which supply water in Manchester.

The defendant is a dentist practising in more than one place in Manchester, but residing at the particular house the subject-matter of this action, where he does some dentistry work of a mechanical nature, and also attends patients. The question is whether he is entitled to require the corporation, and whether the corporation if requested are bound, to supply him with water at the rate chargeable for water supplied for domestic purposes.

The corporation put forward two arguments in support of their case that they are not so bound. The first, founded on s. 93 of the Act of 1847, and the fact that water is used by the defendant in the course of carrying on his profession as a dentist, is, in my opinion, disposed of by the judgment of the House of Lords in the case of *Metropolitan Water Board* v. *Avery* (1), the effect of which is stated by Sargant J. in his

(1) [1914] A. C. 118.

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illuminating judgment in *Oddenino* v. *Metropolitan Water Board* (1); and if the corporation had no other argument on which to rely, I should hold that they had failed to establish their right to any of the declarations claimed in this action. But the Act of 1847 was followed by an Act of 1869 in the nature of an omnibus Act, which contains some recitals and a couple of sections dealing with the water supply, and on s. 16 the second and main argument advanced in support of the corporation's case is based. Sect. 15 is instructive. It indicates, I think, a form of imposition which at one time was not uncommonly practised on the water-supplying authority. Water supplied to a house for domestic purposes was utilized for driving or otherwise in connection with some machinery used for trading purposes; and s. 15 provides for the recovery of penalties from every person so improperly diverting the water. That probably drew attention to the fact that there were in the area of supply numerous premises of a composite nature used partly for business purposes and partly as residences, and in the year 1869 that state of things was, I doubt not, more prevalent in Manchester and other cities than it is now. The habit of living away from business premises is one which has been developed very largely in the years which have elapsed since 1869; but the corporation in framing these two sections 15 and 16 were undoubtedly directing their attention to such composite premises. It was in that class of premises that the abuse which s. 15 was intended to put a stop to was most prevalent and most easily carried out. Sect. 16 was accordingly framed to deal with these composite premises. At the date when the Act of 1869 was passed the owner or occupier of a dwelling-house or part of a dwelling-house situate within 50 yards of any main or other water pipe of the undertakers could request, and on such request the corporation were bound to supply him with, a sufficient quantity of water for domestic use, and if the composite premises to which s. 16 is directed included different tenements, those persons who were occupying tenements distinct from that part of the house which was used for business

(1) [1914] 2 Ch. 734, 739.

purposes could, under s. 93, obtain a supply of water for domestic purposes at the domestic rate; but where the whole house, or any part of it, was used partly for residential and partly for trade or business purposes, then this section excluded the dwelling-house or such part of it as was used in part for residential and in part for trade or business purposes from any right under s. 93 of the earlier Act, and left the occupier or owner to make such agreement as he could with the corporation for a supply by meter or otherwise. I am told, and so far as I can see it is the fact, that there is no statutory obligation on the corporation to supply by meter or agreement; they are empowered so to do, and inasmuch as these undertakings are carried on with a view to profit it is reasonable to assume that the corporation will sell that which they have for sale to any person willing to pay a reasonable price for the same. That probably is the explanation of there being no compulsion on the corporation to supply by meter. The premises occupied by the defendant are used in part as a dwelling-house and in part for business purposes, for I cannot disregard the interpretation imposed on the expression " trade or business " purposes by the Court of Appeal in *Smith* v. *Anderson* (1) and adopted in many subsequent cases. It seems clear they include premises used for professional purposes, and as it is not disputed that this gentleman does use a part of the dwelling-house for professional or business purposes, he is the occupier of a dwelling-house where part of the premises are used for trade or business purposes, and under this section is disqualified from insisting that the corporation should supply him with water at the domestic rate.

In these circumstances the corporation are entitled to the declarations 3 and 4 which they claim, and unless any arrangements have been made in regard to costs the defendant must pay them.

Solicitors: *Sharpe, Pritchard & Co., for F. E. Warbreck Howell, Manchester; Le Brasseur & Oakley.*

(1) 15 Ch. Div. 247, 259, 278.

ROMER J.

1929

May 31;
June 4, 5.

WARD *v.* PATERSON.

[1928. W. 1968.]

Vendor and Purchaser—Restrictive Covenant—"Bungalow."

A conveyance contained a covenant by the purchaser "not to erect more than one bungalow" on the piece of land conveyed:—

Held, that a bungalow was a building of which the walls, with the exception of any gables, were no higher than the ground floor, and of which the roof started at a point substantially not higher than the top of the wall of the ground floor, and that it was immaterial in what way the space in the roof of the building so constructed was used.

WITNESS ACTION.

By a conveyance dated March 20, 1928, the plaintiff conveyed to the defendant a piece of land, and the conveyance contained a covenant by the defendant "not to erect more than one bungalow on the said piece of land." The defendant began to erect on the land a house containing more than one storey, and the plaintiff commenced this action for an injunction restraining the defendant from building on the land a house other than a bungalow.

Archer K.C. and *J. Leonard Stone* for the plaintiff. The ordinary meaning of the word "bungalow" is settled by the dictionaries. It is defined in almost every authoritative dictionary as a building having one storey only. Where a word is in common use in the English language the Court is not entitled to hear evidence as to its meaning, though it may refresh its judicial knowledge by looking at dictionaries and technical works of reference.

[They referred to *Sharp* v. *Harrison*. (1)]

Hon. Geoffrey Lawrence K.C. and *Ronald Smith* for the defendant. The meaning of a word must be accepted in the sense most strongly against the interest of a grantor. It is for the grantor to protect himself: *Kemp* v. *Bird*. (2) The word "bungalow" was originally applied to a building with a flat roof. As soon as the term is applied to a building having a sloping roof a space is to be found in the roof. If

(1) [1922] 1 Ch. 502. (2) (1877) 5 Ch. D. 549.

the Court were to order the removal of all the accommodation upstairs in the defendant's building no one could say that the building was not within the covenant. There is no doubt as to the meaning of the word "bungalow" in England, and the term includes buildings having accommodation in the roof.

Archer K.C. in reply.

June 6. ROMER J. [after stating the facts]: The only question I have to determine is what is the meaning of the word "bungalow." It is said that I ought to have regard to the obvious intention of the plaintiff. But to ascertain his intention I must look at the conveyance and nothing else. For there was no other contract between the parties, and all that I am able to gather from this contract is that the plaintiff wished to restrict the defendant to the erection of one bungalow. I have no doubt that, in insisting on that restriction, he desired to preserve his view as far as possible. Any building, however, would obstruct his view to some extent, and the parties in effect agreed that the view should not be obstructed to any greater extent than it would be obstructed by one bungalow. I can find nothing to give me any further help. If it should turn out that the word "bungalow" meant something different from that which the plaintiff thought it meant, the plaintiff has only himself to thank. If he had wished to insure that the defendant should not erect a building of more than a certain height, nothing would have been easier than for him to specify that height. But I am not entitled to supply some term in the conveyance in order to give him the benefit of something which he intended to preserve, but for which he has omitted to stipulate. That is laid down in *Kemp* v. *Bird*. (1) I must look at the conveyance and the conveyance only and must now consider what the word "bungalow" in the covenant means.

Now it is said by Mr. Archer that the word "bungalow" is an ordinary English word, of the meaning of which the Court must take judicial cognizance, though dictionaries can

(1) 5 Ch. D. 549.

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be looked at for the purpose of refreshing the memory. I do not take that view at all. It is not an ordinary English word. It is an Indian word, or rather a word of Indian derivation, and is obviously used in this conveyance as indicating a building which has some particular architectural features. It is a word of art; and I must find out its meaning from the evidence of persons acquainted with that art. The dictionaries are not unanimous. Looking at the majority of them (1), it would appear that their compilers regarded a bungalow as a house of one storey, lightly built. But the plaintiff called two architects, who told me their view as to the meaning of the word. They at once dissented from the dictionaries, because they agreed that among English architects the word does not now connote a light style of building. They did not even agree that a bungalow is necessarily a building of one storey, for they considered that there might be included in the roof one or more rooms. But they added the reservation that any such room must not be inhabited.

The architects called on behalf of the defendant also agree that the dictionaries are wrong—in that a bungalow is not necessarily a light building or one of one storey, but that it can have a room in the roof, i.e., above the ground floor. They say, however, that such a room can be used for any purpose whatsoever, and need not be uninhabited or uninhabitable.

Having heard the evidence on both sides, I attach more weight to that of the defendant's experts than to that of the plaintiff's experts, because, when once it is admitted that the bungalow may have two storeys, in the sense that it may contain a room in the roof above the ground floor, it does not seem reasonable to suppose that when the room is a boxroom the building is a bungalow, but that when it is a bedroom the building is not a bungalow.

The defendant's experts have indeed given a definition which I accept—namely, that a bungalow is a building of which the walls, with the exception of any gables, are no

(1) [Including the second edition (1929) of the Concise Oxford Dictionary.]

higher than the ground floor, and of which the roof starts at a point substantially not higher than the top of the wall of the ground floor, and that it does not matter in what way the space in the roof of the building so constructed is used. The defendant's architects are not merely expressing their own opinion, but they fortify it by reference to technical literature used in their profession. Mr. R. A. Briggs, for instance, in his book, Bungalows and Country Residences, gives the following definition: "A bungalow in England has come to mean neither the sun-proof squat house of India nor the rough log hut of colder regions. It is not necessarily a one-storied building, nor is it a country cottage. A bungalow essentially is a little 'nook' or 'retreat.' A cottage is a little house in the country, but a bungalow is a little country house—a homely, cosy little place, with verandahs and balconies, and the plan so arranged as to ensure complete comfort with a feeling of rusticity and ease."

In the book itself he gives illustrations of various bungalows, and some of his illustrations are of houses which conform to the definition given by the defendant's witnesses, and which contain in the roof space one or more rooms. In all the literature to which I have been referred there are to be found instances of bungalows complying with the definition of the defendant's experts, and having a roof space intended to be used for habitation.

There is one further observation to be made. The plaintiff contends that this building obstructs his view considerably more than it would be obstructed by a bungalow in the narrower sense used by the plaintiff's experts. But even accepting the definition of the plaintiff's experts, this building would be a bungalow if the rooms inside the roof were taken away, and, if that were done, the roof would be just as high as it is at present, having regard to the angle of slope necessitated by the use of the tiles employed by the defendant. If I had been able to hold that the plaintiff was right and that a bungalow is a building such as his witnesses suggest, his view might have been damaged to precisely the same extent as it is at present. However that may be, I have

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come to the conclusion that I must give the word " bungalow " the definition which I have mentioned, and that the defendant's building is a bungalow within that definition. The action must be dismissed with costs.

Solicitors: *Field, Roscoe & Co., for J. Noel Cooper, Saxmundham; Hon. M. L. Moss.*

J. L. D.

CLAUSON J. 1929 *May* 9.

In re PRICE.

PRICE *v.* PRICE.

[1929. P. 455.]

Law of Property—Transitional Provisions of the Law of Property Act, 1925—*Land held in Undivided Shares—Legal Estate in Land vested in Tenants for Life in Equal Shares with Legal Estate in Remainder in a Sole Trustee on Trust for Sale—Entirety of Settled Land not vested in Trustees of Settlement as Joint Tenants—Vesting in Public Trustee—Appointment of New Trustee—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *Part IV., para.* 1 *of First Schedule—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 1, *sub-s.* 1 (*b*).

Under and by virtue of the will of a testator who died in 1921, and of subsequent dispositions, acts in the law and events, the legal estate in certain freehold land was, immediately before the commencement of the Law of Property Act, 1925, vested in two persons for their lives share and share alike, the legal estate in remainder expectant upon the lives of those persons and the life of the survivor of them being vested in a single trustee upon trust after the death of the surviving tenant for life to sell the land and divide the proceeds between the testator's nephews and nieces.

Upon a summons by the tenants for life, who were desirous of selling the land, to have it determined in whom, upon the coming into force of the Law of Property Act, 1925, the land was vested:—

Held, first, that, as immediately before the commencement of that Act the land was held at law and in equity in undivided shares, vested in possession, and the entirety thereof was settled land, sub-para. 3 of para. 1 of Part IV. of the First Schedule to the Law of Property Act, 1925, would apply, if there were more than one trustee of the settlement constituted by the will, in whom the land could vest as joint tenants; but that, as there was only one trustee, the land vested, under cl. (i.) of the proviso to that sub-paragraph, in the Public Trustee upon the statutory trusts. Secondly, that if, before the Public Trustee accepted the trust, the present trustee (who before the commencement of the

Law of Property Act, 1925, was the trustee of the settlement constituted by the will for the purposes of the Settled Land Acts then in force) appointed an additional trustee or trustees of that settlement, the land would vest in the trustees of the settlement as joint tenants upon the statutory trusts.

ADJOURNED SUMMONS.

By his will, dated June 23, 1921, the testator gave and bequeathed his freehold messuage or dwelling-house called "Ivyhurst" at Keswick together with household furniture moneys or securities for money and all other effects whatsoever (after payment of his debts, funeral and testamentary expenses and death duties) to his sister Jane Price for her own use and benefit during her life. The testator then directed that after her decease the income from investments together with the use of or receipts from the estate and effects should devolve on his sisters Elizabeth M. Davies Jones and Margaret Price for their lives share and share alike or the survivors of them. After the decease of those three sisters the whole of the estate securities and effects were directed to be sold and the proceeds were directed to be divided between the testator's godson and his nephews and nieces then living share and share alike. The testator appointed Jane Price sole executrix of his will.

The testator died on August 6, 1921, seised of "Ivyhurst" in fee simple. Jane Price proved the will and died on December 10, 1924, having enjoyed the use of "Ivyhurst" during her life and having by her will appointed her sister Margaret Price executrix thereof who proved the same on March 31, 1925. Since the death of Jane Price her two sisters Elizabeth Davies Jones and Margaret Price had been in the receipt of the rents of "Ivyhurst." By deed dated August 5, 1925, which contained a recital that Jane Price had paid all the testator's funeral and testamentary expenses and debts, Margaret Price appointed Charles W. Price to be a trustee of the testator's will in the place of Jane Price deceased and declared that "Ivyhurst" should vest in Charles W. Price as trustee of the testator's will for the purposes and upon the trusts thereof.

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The two sisters, being desirous of selling "Ivyhurst," took out the summons (to which Charles W. Price and some of the testator's nephews and nieces and the Public Trustee were made defendants) to have it determined whether "Ivyhurst" became, upon the coming into force of the Law of Property Act, 1925, vested upon the statutory trusts in (*a*) Charles W. Price under para. 1, sub-para. 1, of Part IV. of the First Schedule to that Act, as the person in whom the property was vested as a trustee immediately before the commencement of the Act; (*b*) Charles W. Price under para. 1, sub-para. 3, of Part IV. as the trustee for the purposes of the Settled Land Acts, 1882 to 1890, of the settlement affecting the property under the will; or (*c*) the defendant the Public Trustee under proviso (i.) of sub-para. 3.

Charles Harman, for the plaintiffs, stated the facts to the Court.

G. D. Johnston for the defendants, except the Public Trustee, service of the summons upon whom was dispensed with. If the old law were applicable to the facts of the present case it would seem that the legal estate in "Ivyhurst" undisposed of after the death of the surviving tenant for life would vest in the testator's heir at law upon trust for sale: and the Court would enforce against the legal proprietor the execution of the trust for sale implied in a direction to sell the land: Lewin on Trusts, 13th ed., pp. 103, 859: *Pitt* v. *Pelham* (1) and *Locton* v. *Locton*. (2)

The testator, however, having died after the date of the Land Transfer Act, 1897, his real estate became vested in Jane Price as his personal representative: see s. 1, sub-s. 1, of that Act; and by virtue of s. 2, sub-s. 1, she held his real estate as trustee for the persons by law beneficially entitled thereto. Upon Jane Price, as personal representative, assenting to the devise, the legal estate vested in the tenants for life during their lives and the life of the survivor, while the legal estate in fee simple in remainder expectant upon those lives did not pass to the heir at law, but remained vested in

(1) (1667–70) Freem. 134. (2) (1638) Freem. 135.

Jane Price: see Land Transfer Act, 1897, s. 3, sub-s. 1: and under the direction to sell contained in the will she became a trustee with a future trust for sale. She therefore was a trustee of the settlement constituted by the will for the purposes of the Settled Land Acts, 1882 to 1890; and, having regard to the appointment by the deed of August 5, 1925, of Charles W. Price, Charles W. Price immediately before the commencement of the Law of Property Act, 1925, was the sole trustee of that settlement for the purposes of the Settled Land Act, 1925. The land, immediately before the commencement of the Law of Property Act, 1925, was held both at law and in equity in undivided shares vested in possession; and at that date (the material date to be regarded: see *In re Ryder and Steadman's Contract* (1) and *In re Catchpool* (2)) the entirety of the land was settled land and, if there were more than one trustee, the land would vest in the trustees of the settlement as joint tenants upon the statutory trusts under sub-para. 3 of para. 1 of Part IV. of the First Schedule of the Law of Property Act, 1925. In *In re Myhill* (3) Astbury J. held that where land (not settled land) was vested in a single trustee for persons entitled in undivided shares sub-para. 1, was applicable, as the plural number upon the proper construction of that sub-paragraph, having regard to the Interpretation Act, 1889, s. 1, sub-s. 1 (*b*), included the singular. If sub-para. 3 did not apply and the land did not vest in Charles W. Price under that sub-paragraph then it vested, under the proviso to that sub-paragraph, in the Public Trustee and, in default of his acceptance of the trusts of the settlement, a new trustee may be appointed, although such settlement has now ceased to exist; whereupon the land will vest under cl. (iv.) of the proviso in Charles W. Price and such new trustee as joint tenants upon the statutory trusts.

Charles Harman in reply. It is submitted that the true view may be that, when Jane Price as personal representative of the testator gave her assent—of which there is evidence in the recital to the deed of appointment of August 5, 1925

(1) [1927] 2 Ch. 62. (2) [1928] Ch. 429.
(3) [1928] Ch. 100.

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—to the devise of the land to the tenants for life, she denuded herself of the whole legal estate which consequently devolved, subject to the estate during the lives of the three tenants, upon the testator's heir at law. It is questionable whether Margaret Price had power to make the appointment purported to be made under the deed of August, 1925 ; if she had not that power, the legal estate never became vested in Charles W. Price.

CLAUSON J. [after stating the facts, continued:] The question for my decision is how far the title to the land in question is affected by the Law of Property Act, 1925. In the first place it is to be observed that no trustee was appointed by the will of the testator. There was, in effect, a direct devise to Jane Price for her life and then to the plaintiffs, her two sisters for their lives and the life of the survivor of them ; but there is no disposition by the will of the legal estate in the land in remainder expectant upon the lives of the three sisters : and the will is silent as to who are to perform the future trust for sale of the land upon their decease. It has been suggested that, under s. 3, sub-s. 1, of the Land Transfer Act, 1897, the effect of the assent by Jane Price—which I think is sufficiently evidenced by the recital in the deed of appointment of August 5, 1925—was to denude her of the entire legal estate in the land and to vest it, subject to the intervening life estates, in the heir at law of the testator, who will, upon the death of the survivor of the tenants for life, come under the obligation to sell the land. But in my view of this case, the effect of the Land Transfer Act was to vest the legal estate in Jane Price as the personal representative of the testator. There is evidence that she assented to the devise to the life tenants, but with regard to the legal estate in remainder expectant upon those lives, I think that that estate was retained by Jane Price and upon her death devolved upon Margaret Price, her personal representative, and later, by virtue of the deed of appointment of August 5, 1925, and the vesting declaration therein, became vested in the defendant Charles W. Price, who

consequently, came under the future obligation to sell the land. Thus, immediately before the commencement of the Law of Property Act, 1925, the land was settled land and Charles W. Price was the trustee of the settlement with a future trust for sale, and therefore the trustee for the purposes of the Settled Land Acts in force at that date. Turning to Part IV. of the First Schedule to that Act, immediately before the commencement of the Act, the land was held both at law and in equity in undivided shares vested in possession within para. 1. The entirety of the land not being vested in the trustee, the case does not fall within sub-para. 1; nor does sub-para. 2 apply to the case. The entirety of the land being, before the commencement of the Act, settled land, sub-para. 3 would apply, if there were trustees of the settlement constituted by the will in whom it was capable of vesting as joint tenants. As, however, Charles W. Price is the sole trustee, it is impossible to predicate of this settlement that there are trustees in whom the land can vest as joint tenants. In the absence of such trustees the land, through the effect of cl. (i.) of the proviso, became vested in the Public Trustee. But, if before he accepts the trust, an additional trustee of the settlement is appointed to act with Charles W. Price, the land will, by force of cl. (iv.) of the proviso, vest in those trustees as joint tenants upon the statutory trusts. It was suggested that Charles W. Price has not power to make the appointment, because the land has ceased to be settled land; but that, in my judgment, will not preclude him, who before the Law of Property Act, 1925, was a trustee of the settlement for the purposes of the Settled Land Acts then in force, from appointing a trustee of that settlement for those purposes. There will, accordingly, be a declaration that the land is vested in the Public Trustee; but, if, before his acceptance of the trust, an additional trustee of the settlement is appointed, the land will vest in those trustees, as joint tenants upon the statutory trusts.

Solicitors: *Stow, Preston & Lyttelton, for George Tudor, Brecon.*

H. C. H.

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May 28; *June* 5.

CHOWOOD, LIMITED *v.* LYALL.

[1928. C. 1896.]

Practice—Discovery—Title to Land—Affidavit of Documents—Objection to produce—Conclusiveness of Statement on Oath of Grounds of Objection—Disputed Boundaries—Order XXXI., *r.* 19A, *sub-r.* 2.

There is no clear authority that in proceedings for the production of documents of title to land, the Court will differentiate cases where boundaries are in dispute from other cases. Although the Court is more ready to order production of documents in cases where boundaries are in dispute, it will apply to those cases the same principle which is applied to other cases where the title to land is in dispute—namely, the principle adopted by the Court of Appeal in *Attorney-General* v. *Emerson* (1882) 10 Q. B. D. 191, 197, 198, that the assertion on oath by the party against whom production is sought that the documents which he objects to produce relate solely to his own title and do not tend to prove or support the case of his opponent will not be disregarded, unless the Court is reasonably certain that the deposing party misconceived the nature or effect of those documents.

PROCEDURE SUMMONS.

The plaintiffs in the action, which was one of trespass, claimed an injunction to restrain the defendant her agents servants and workmen from cutting timber or underwood or otherwise trespassing upon a strip of woodland called the "Sheepwalk Shaws" belonging to the plaintiffs and for damages. The plaintiffs alleged that since April 22, 1925, under the Land Transfer Acts, 1875 and 1897, they had been and under the Land Registration Act, 1925, they still were the registered proprietors with an absolute title of freehold land adjoining a certain sheepwalk leading northward from Hurst Lane in the parish of Walton-on-the-Hill in the county of Surrey, the boundaries whereof were described on a certain plan filed at the Land Registry, and they further alleged that the strip called the "Sheepwalk Shaws" was within the eastern boundary of their land where it adjoined the sheepwalk, the soil of which the plaintiffs admitted was in the ownership of the defendant. The defendant, on the other hand, claimed to be the owner of the "Sheepwalk Shaws" and to have been in undisturbed possession since 1893 of the eastern portion thereof running parallel with and adjoining the

sheepwalk. The defendant further claimed that, as the owner of Northern Field, lying to the north of the plaintiffs' land and west of the sheepwalk, she had been in undisturbed possession since 1893 of the northern part and since 1911 of the whole of the strip of woodland called the "Northern Shaws" lying along the northern boundary of the plaintiffs' land from the northern end of the sheepwalk; and she counter-claimed, first, a declaration that she was the estate owner in respect of the fee simple of the eastern part of "Sheepwalk Shaws" and of "Northern Shaws" of which the plaintiffs were or claimed to be the registered proprietors with an absolute title under the Land Registration Act, 1925; and, secondly, rectification of the register of the title to the land of which the plaintiffs claimed to be the registered proprietors by excluding from such title the eastern part of "Sheepwalk Shaws" and "Northern Shaws."

In obedience to an order for discovery the plaintiffs, on April 4, 1929, made an affidavit specifying the documents which they had in their possession or power relating to the matter in question in the action, but objecting to produce a bundle of documents of title dated before April 22, 1925, on the ground that they related solely to the plaintiffs' title to the land mentioned in their statement of claim and did not in any way tend to prove or support the case of the defendant. Accordingly, the defendant applied for an order on the plaintiffs to make a further and better affidavit of their documents of title to the property, the subject of the action, before April 22, 1925, and to have inspection of the same.

C. L. Fawell for the applicant, the defendant. The question in dispute relates to boundaries. "In matters of disputed boundary, ... the general assertion has been disregarded and inspection of the parcels in the title deeds and of other documents has been ordered": Bray on Discovery (1885), p. 508: *Hungerford* v. *Goreing* (1); *Earp* v. *Lloyd* (2); *Attorney-General* v. *Emerson*. (3) In those three cases boundaries were in dispute; in *Earp* v. *Lloyd* (2) the object

(1) (1687) 2 Vern. 38. (2) (1857) 3 K. & J. 549, 551, 553.
(3) 10 Q. B. D. 191, 197, 198.

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was to obtain discovery of everything that would show the boundary: and discovery was ordered, although the documents might contain evidence common to both parties. In *Attorney-General* v. *Emerson* (1) the question was as to the boundary between two manors; nobody could tell where the boundaries were, except so far as they could be ascertained from an inspection of the court rolls. A common boundary is as much the property of the defendant as it is that of the plaintiffs, and where the question in dispute relates to a common boundary, which an inspection of the plaintiffs' documents will in all probability show, the Court will order inspection. *Roberts* v. *Oppenheim* (2) was not (as Kay J. said it was not) a case of boundaries, nor a case in which one party suggested that his property was coterminous with the other party's property, but there was an entire denial of the title of the other party to the land in dispute. In *Lind* v. *Isle of Wight Ferry Co.* (3), although the Court was careful not to allow the defendants to pry into the flaws or defects of the plaintiffs' title, they were allowed inspection of the parcels in the plaintiffs' deeds so far as related to the boundaries of the plaintiffs' manor. The map of the plaintiffs' registered property is not conclusive evidence of the boundaries: the map is only evidence of general boundaries; the exact boundary is left undetermined: r. 274 of the Land Transfer Rules, 1903. The Court has power to inquire behind the register, and in a proper case to rectify it: s. 82 of the Land Registration Act, 1925.

The land certificate is not conclusive as against the claim of a contiguous landowner and is not conclusive as against the defendant, who had no notice of the plaintiffs' intention to have the boundaries fixed: see r. 272 of Land Transfer Rules, 1903.

N. C. Armitage for the plaintiffs, the respondents to the summons. The proposition stated in Bray on Discovery (1885) is not repeated in Bray's Digest of the Law of Discovery

(1) 10 Q. B. D. 191, 197, 198. (2) (1884) 26 Ch. D. 724.
(3) (1860) 8 W. R. 540.

published in 1910 nor in that author's notes on Order XXXI., in the Annual Practice. The authorities cited in favour of that proposition do not support it. *Hungerford* v. *Goreing* (1) contradicts that proposition: in that case the lands of both parties lying contiguous, the plaintiff claimed discovery of the defendant's title deeds showing the boundaries, and the Court refused an order for discovery on the ground that it would not compel a party to supply evidence which would enable the other to evict him. *Earp* v. *Lloyd* (2) does not relate to disputed boundaries: the question there was whether the land the minerals under which were claimed by the defendant under a reservation of the minerals in a certain deed was identical with the plaintiff's land. The principle upon which the Court acts in such a case as the present is laid down in *Attorney-General* v. *Emerson.* (3) It is that when the Court is reasonably certain that the deponent does not properly appreciate the nature and effect of the documents, it will order discovery; but it draws no distinction between cases where boundaries are in dispute and other cases. *Roberts* v. *Oppenheim* (4) is in the plaintiffs' favour. That was a case of disputed boundaries just as much as this is, notwithstanding the remarks of Kay J., who meant that it was not a case where the precise position of the boundary was in dispute. The question was whether a certain piece of land was part of the street. The plaintiffs take their stand upon the title given them by their land certificate of registration with an absolute title which vested in them the fee simple: see s. 7 of Land Transfer Act, 1875. The defendant can succeed only if she can succeed in rectifying the plaintiffs' registered title, and rectification can only be obtained by proving fraud or mistake. Their certificate, given after advertisements of their application for registration under r. 37 of the Land Transfer Rules, 1903, protected the plaintiffs against the claims of all who did not object. The defendant can only succeed by relying upon the strength of her own title and is not entitled to have discovery in order

(1) 2 Vern. 38.
(2) 3 K. & J. 549, 551, 553.
(3) 10 Q. B. D. 191, 197, 198.
(4) 26 Ch. D. 724.

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to assist her to win through the weakness of her opponents' title. This is an attempt on the part of the defendant to establish an adverse title to the land in dispute by discovery of the plaintiffs' title: the defendant is not entitled to say to the plaintiffs: "Let me see the evidence you are going to use in support of your case": *Owen* v. *Wynn*. (1) In an action of ejectment the defendant is not bound to produce his own title deeds: the plaintiff must recover by the strength of his own title; and the position of the defendant in the present case is analogous to that of a plaintiff in an action of ejectment: *Attorney-General* v. *Newcastle-upon-Tyne Corporation*. (2)

The hearing was then adjourned to enable the judge under Order XXXI., r. 19A, sub-r. 2, to inspect the documents for the purpose of deciding as to the validity of the plaintiffs' claim of privilege.

June 5. CLAUSON J. [after stating the facts leading up to the summons, as the same are above set forth, proceeded as follows:] The defendant has taken out this summons for an order on the plaintiffs to make a further and better affidavit of documents of title dated before April 22, 1925, relating to the property the subject of the action, the object of the summons being to obtain inspection of the bundle of documents of title which the plaintiffs objected to produce. I have been referred to the case of *Attorney-General* v. *Emerson* (3), in which Baggallay L.J. quoted with approval the rule laid down by Knight-Bruce V.-C. in *Combe* v. *Corporation of London*. (4) The rule is as follows: "If it be with distinctness and positiveness stated in an answer, that a document forms or supports the defendant's title, and is intended to be, or may be, used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title, or the plaintiff's case; that document is, I conceive, protected from production, unless the Court sees, upon the answer itself,

(1) (1878) 9 Ch. D. 29, 33.
(2) [1899] 2 Q. B. 478.
(3) 10 Q. B. D. 191.
(4) (1842) 1 Y. & C. 631, 651.

that the defendant erroneously represents or misconceives its nature." Applying that rule, which had the authority of the whole Court of Appeal in *Attorney-General* v. *Emerson* (1), I am bound to accept the averment of the plaintiffs made on oath that the bundle of documents which they claim to be privileged from inspection do not in any way tend to prove or support the case of the defendant, unless I can see or, in other words, it is reasonably certain, upon the affidavit itself, that the plaintiffs erroneously represented or misconceived the nature and effect of those documents. Applying the rule, I confess I can see nothing in the plaintiffs' affidavit or in the circumstances of the case which justifies me in finding that the plaintiffs nave erroneously represented or misconceived the nature or effect of the documents which they objected to produce. But it was contended that in cases where the boundaries between the respective properties of the disputants are in question a different principle has been applied, and that in such cases the title deeds must be produced for the inspection of the party claiming their production, notwithstanding that the other objecting party has made the statement on oath which the plaintiffs have made in the present case. It is true there have been cases which are referred to in text-books from which it would appear that in boundary cases the Court has been more ready to allow the party claiming inspection to question the truth of the other party's statement on oath that the documents are privileged from production, but there is no clear authority to justify differentiating cases where boundaries are in dispute from other cases or for disregarding in such cases a positive assertion on oath.

The real question is whether, applying the test laid down in the two cases I have quoted, the plaintiffs have erroneously represented or misconceived the nature or effect of the documents. The Court is empowered by Order XXXI., r. 19A, sub-r. 2, to inspect the documents in question for the purpose of deciding as to the validity of the claim of privilege. I have exercised the power given to the Court by the rule and

(1) 10 Q. B. D. 191.

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after a careful examination of the documents, I am satisfied that the plaintiffs when making the statements in their affidavit of documents that the documents which they objected to produce did not in any way tend to prove or support the case of the defendant, made it deliberately, after having carefully considered the contents of those documents and their bearing upon the title to the strips of land in question ; indeed, I think that I should myself, after the perusal I have given the documents, have felt little difficulty in making the same statements in respect to the title to the strips of land in question as the plaintiffs have made. I can accordingly see no ground which justifies me in going behind the plaintiffs' oath and I make no order on this summons, except that the costs must be the plaintiffs' in any event.

Solicitors : *Routh, Stacey & Castle, for Thring, Sheldon & Ingram, Bath ; Corsellis & Berney.*

H. C. H.

CLAUSON J. 1929 *June* 7, 11.

In re TERRY.

TERRY *v.* TERRY.

[1884. T. 2120.]

Administration—Practice—Application for Payment out of Court—Fund in Court exceeding 1000*l.—Costs of Management—Summons or Petition—Order* LV., *r.* 2, *sub-r.* 13.

When, in an administration action upon a summons connected with the management of the property, under Order LV., r. 2, sub-r. 13, a judge of the Chancery Division sitting in Chambers makes an order sanctioning the expenditure of a certain sum out of capital for the purposes authorized, he has ancillary jurisdiction under that sub-rule, by the same order to give full practical effect thereto by further directing payment of the sum so authorized out of a fund of whatever amount standing in Court to the general credit of the action.

SUMMONS.

In the action for the administration of the estate of the testator, who died on July 8, 1884, having by his will directed that his estate should be administered by the Court, an order

was made on December 3, 1884, for the usual accounts and inquiries. On the further consideration of the action on June 12, 1890, an order was made directing payment into Court of the capital in the hands of the trustees.

No question arose upon the construction of the will and no order was asked for or made declaring rights.

At the time when this summons was issued, the estate consisted of 2263*l.* 5*l.* per cent. War Stock standing to the general credit of the action, and freehold farms and properties of considerable extent.

From time to time applications with reference to the management of the estate had been made by summons in the action under Order LV., r. 2, sub-r. 13, and orders had been made on those summonses for raising and paying out of the funds in Court the expenses incurred in carrying out those orders and duties and costs.

By summons dated April 10, 1929, the trustees applied for leave to accept certain estimates for carrying out necessary repairs and improvements at three farms belonging to the estate, and that the amount of those estimates totalling 230*l.* might be raised and paid out of the fund in Court. Upon the hearing of that application in Chambers, the judge considered that the expenditure was proper; but a doubt was raised whether an order for the payment of the sum required could be made except upon petition. The summons was, accordingly, adjourned into Court for the determination of the point—namely, whether an order for payment out of the fund in Court exceeding 1000*l.* of the sum of 230*l.* already sanctioned in Chambers could be made on the summons or whether a petition was necessary.

Preston K.C. and *Cyril J. Parton* for the applicants, the trustees of the will, and for a tenant for life of a share in the estate and for some of the beneficiaries absolutely entitled subject to the life interests. Payment out is sought under sub-r. 13. If the Court has jurisdiction—as it must have—under that sub-rule to sanction the expenditure of any amount for purposes of management, it has, as ancillary to that

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jurisdiction, power to provide for the payment of the amount out of the fund in Court, although that fund exceed 1000*l.*, in order to give practical effect to its own order: see *In re Harrison's Trusts* (1889) *H.* 329, an unreported case, noted in the Annual Practice, 1929, p. 1056.

Sub-r. 13 is not qualified or affected by sub-r. 2. It is quite independent of that sub-rule: *Ex parte Maidstone and Ashford Ry. Co.* (1); *In re Brandram.* (2)

[They also referred to the Settled Land Act, 1882, s. 46, sub-s. 3; r. 2, of Settled Land Act Rules, 1882, and *In re Torry Hill Estate.* (3)]

The order for payment out cannot be made under sub-r. 2 because the fund in Court exceeds 1000*l.*: *May* v. *Dowse.* (4) Further, it might, it is submitted, be made under sub-r. 1, which prima facie refers to persons beneficially interested. But the sub-rule may apply to the present case, where the rights of the trustees have been recognized in several previous instances: there is no question as to their identity.

A. C. Nesbitt for the plaintiff in the action, a tenant for life of another share in the estate. I support the application. Payment out is incidental to the management under sub-r. 13. That sub-rule is an enabling rule; it is framed in the widest and most general terms. If payment out cannot be obtained under sub-r. 13, by summons, sub-rr. 2 and 3 are defeated. Where the only object is payment out, application is properly made under sub-rr. 1 or 2. I admit that apart from the rules, payment out must be on petition or on further consideration, but the rules were framed for the purpose of enabling payment out on summons. Sub-r. 12 would be abortive, if payment out could not be ordered under it.

Charles Harman, for the trustees of the settlement of a beneficiary, also supported the application.

CLAUSON J. This is an application by summons in an action started in the year 1884, the original order directing inquiries in the administration action being pronounced on

(1) (1883) 25 Ch. D. 168.
(2) (1883) 25 Ch. D. 366.
(3) [1909] 1 Ch. 468.
(4) (1884) W. N. 122.

December 3, 1884. There was further consideration in June, 1890. The action is, however, still on foot.

Certain moneys forming part of the estate are in Court to the general credit of the action. Those moneys are admittedly of the nature of capital. The present application is by the trustees of the will, and asks that the applicants may be at liberty to accept certain estimates for work of the nature of improvements to certain land which forms part of the corpus of the testator's estate, and that the money required to pay for those improvements, in the event of the estimates being accepted, should be paid out of Court to the persons who, it is contemplated, will execute the works, upon a proper certificate by the surveyors who have always acted for the trustees, that the works have been properly completed. Upon the summons coming before my brother Luxmoore, he was satisfied that the estimates were proper, that the work ought to be done, and that the cost was properly payable out of the capital of the testator's estate. The summons is now adjourned into Court in order to deal with one point, and one point only. The sum is comparatively small: it amounts to 230*l.* It is suggested, however, that it will be irregular for the Court to make an order for payment of the sum out of the fund in Court otherwise than on petition.

Now, all the counsel are agreed that the primary practice of the Court is to order funds to be paid out of Court only upon the hearing—whether the original hearing or the hearing on further consideration—of an action or on a petition, and that if an order for payment of funds out of Court is to be made otherwise than on the hearing of the action or on petition, that order will be irregular, unless something is found in the rules which authorizes the making of such an order.

On the rules the matter stands in this way. Under Order LV., r. 2: "The business to be disposed of in chambers by judges of the Chancery Division, shall consist of the following matters, in addition to the matters which under any other rule or by statute may be disposed of in chambers." Then follow a number of sub-rules to some of which I shall have to refer. Here I must pause to say that, although this

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summons is adjourned into Court, it is common ground that the Court has no further or other power of making an order of the kind asked for on an adjourned summons in Court than it would have if the summons remained in chambers. I have to find something which authorizes me, sitting in chambers, to make an order for payment of this sum out of Court. Sub-r. 1 authorizes the judge to deal in chambers with: "Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights or where the title depends only upon proof of the identity or the birth, marriage, or death of any person." In the first place, it is said it is in substance asking for payment to the trustees, although in fact it asks for payment to the people who do the work. If it were in that form this, it is argued, could be said to be an application for payment where there has been a judgment or order declaring the rights, because there have been numerous orders in this action recognizing that the trustees are the trustees of the will and that they are in the position of persons whose rights have been declared. The argument is ingenious, but I do not, at the moment, see my way to hold that I have jurisdiction to make this order under sub-r. 1.

Sub-r. 2 is this: "Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where the cash does not exceed 1000*l.* or the securities do not exceed 1000*l.* nominal value (or the applicant proves that the securities do not exceed 1000*l.* actual value)."

Now the sum which is asked to be paid out here is, as I have said, in the aggregate a sum of 230*l.*, but I do not propose to hold that I have jurisdiction under this rule to make the order for payment out, and for this reason: some forty-four years ago Pearson J. decided that the true meaning of the rule is that applications for payment out may be made in chambers only where the total fund in Court does not exceed 1000*l.*, but cannot be made in chambers where the sum in Court exceeds 1000*l.*, even though the sum sought

to be paid out is less than 1000*l*. That decision was come to some forty-four years ago, and I think every one who has had dealings with the matter is aware that the decision has been consistently followed. If the decision be wrong, the matter can easily be remedied, but I think I ought to proceed upon the footing that it is right and, accordingly, I do not see my way to hold that that sub-rule gives me power to make this particular order as it deals with a fund which exceeds 1000*l*. Sub-r. 3 authorizes: "Applications for payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter, whether to a separate account or otherwise." Now, Lawrence J. has decided on that sub-rule, in a case which is not reported, that where an application is made under that sub-rule with regard to the payment of dividend, the Court can, as ancillary to its order dealing with dividend, make the provision necessary for enabling the order to be worked out correctly by providing for payment of costs and duties out of the capital of the fund, even though the fund exceeds 1000*l*. I understand that to mean that, where a sub-rule authorizes an order in chambers to be made dealing with the income of a fund, the judge has power by necessary implication, to do everything necessary to make the order work out correctly as, for example, by providing for costs and duties which have to be borne by the fund. I pass over sub-rules which deal with applications under particular Acts, and so forth, and I come to sub-r. 12: "Applications as to the guardianship and maintenance or advancement of infants."

Now, I am encouraged by the decision of Lawrence J. to which I have just referred to give a somewhat wide meaning to sub-r. 12. If an application were before me relating to the guardianship and maintenance or advancement of an infant and part of the application were that a sum should be advanced for the infant out of a fund standing in Court to the infant's credit, I should consider the sub-rule to authorize me, not only to sanction the advancement of the infant by expending upon him such and such a sum, but also to direct the sum to be paid out of Court in order to carry

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into effect the order for the advancement of the infant. It is no good making an order that the infant be advanced, unless the means by which he is to be advanced are provided.

I now come to sub-r. 13: "Applications connected with the management of property." In my view that rule must similarly be construed practically. If there were an application before the judge in chambers and he were satisfied that a sum ought properly to be expended out of capital in connection with the management of the property—and that, of course, is this case—can it be the true meaning of the sub-rule that all he can do is to say that the money shall be spent, and that he must then send the parties away to present a petition to get the money out of Court? I cannot conceive that that is the true meaning of the sub-rule. In my view, the sub-rule gives the judge in chambers, on an application connected with the management of property, full jurisdiction to do whatever is proper, within the bounds of the Court's powers, to carry out and effectuate the order which he proposes to make, and if he is satisfied that the fund in Court is properly applicable for the purposes, in my view he has authority, under that sub-rule, to make in chambers an order that the money shall be so applied, which will, of course, involve an order that the money be paid out of Court. This sub-rule is entirely separate from sub-r. 2, and the fact that sub-r. 2 relates, on the construction which I feel bound to put upon it in view of the decisions, to funds of a particular size, not exceeding a particular amount, does not seem to me to be material, in considering what the powers are which are given to the Court under sub-r. 13.

Accordingly, on that ground, I hold that it is within the jurisdiction of the judge in chambers to make such an order as is asked for in this case, and none the less because it involves a direction that certain moneys shall be paid out of Court.

The origin of the rule is traceable to the Court of Chancery Act, 1852 (15 & 16 Vict. c. 80), s. 26, which provides that: "The business to be disposed of by the Master of the Rolls and Vice-Chancellors respectively while sitting at chambers"

—they, of course, are the predecessors for this purpose of the judges of the Chancery Division—"shall consist of such of the following matters as the judge shall from time to time think may be more conveniently disposed of in chambers than in open Court; videlicet, applications for time to plead, answer or demur; for leave to amend bills or claims; for enlarging publication; and also applications for the production of documents; applications relating to the conduct of suits or matters; applications as to the guardianship and maintenance of infants; matters connected with the management of property."

It is not uninteresting to notice that the present sub-r. 12 goes a little further with regard to matters relating to infants than that section of the 1852 Act, because there are now added to the words in that section the words " or advancement " ; but so far as the management of property is concerned, the wording in the Act of 1852 is the same as the wording in sub-r. 13. I asked counsel if they could inform me whether in the earlier years before the Judicature Act and subsequent to the Act of 1852, any instance had been found of orders made in chambers on applications connected with the management of property which involved the payment of sums out of Court, and I am not surprised to hear that it has not been possible in the time at the disposal of counsel to find any precedent for such an order.

It appears to me, however, that it is my duty to construe the rules as they stand, and accordingly, whatever a Vice-Chancellor might or might not have felt himself at liberty to do under s. 26 of the Court of Chancery Act, 1852, I propose, for myself, under this sub-r. 13 to make the order that is proposed.

Solicitors: *Rose, Johnson & Hicks; Capel Cure & Ball; Farrar, Porter & Co.*

H. C. H.

C. A.
1929
June 6, 7.

In re GATES.

GATES *v.* CABELL.

[1928. G. 2245.]

Will — Construction — Bequest "of all my money" — Absence of Context — Surrounding Circumstances.

A testator made his will in the following terms: "I leave all my money to A. B." His estate included cash in the house, in his solicitors' hands and on current account at his bankers, furniture, stocks and shares, and an equity of redemption in freehold property:—

Held, that in the absence of any context the word "money" must be construed in its strict sense, and that the will therefore only passed the cash in the house, in his solicitors' hands and on current account at his bank.

In re Taylor [1923] 1 Ch. 99 followed.

Order of Clauson J. varied.

Appeal from a decision of Clauson J.

The testator, Alfred Gates, duly made his will dated March 21, 1927, in the following words: "I leave all my money to Alfred George Cabell." The testator appointed no executors of his will.

The testator died on April 21, 1927, a widower without issue, leaving a brother, three sisters and ten nephews and nieces, children of deceased brothers.

The estate of the testator at his death comprised the following items: (1.) cash in the house, 4*l.*; (2.) cash with the testator's solicitors, 1*l.* 13*s.* 4*d.*; (3.) uncashed cheque on Barclays Bank in the testator's favour, 5*l.* 5*s.*; (4.) cash at Lloyds Bank, Sherborne, on current account, 1599*l.* 1*s.* 7*d.*; (5.) 5 per cent. War Stock 1929/47 500*l.*; (6.) Registered National War Bonds, 200*l.*; (7.) Consolidated 4 per cent. Stock inscribed, 236*l.*; (8.) shares and debentures in various companies of an approximate value of 1161*l.*; (9.) furniture, sold since the death for 537*l.* 12*s.*; (10.) life policy for 500*l.*, including bonuses valued at 849*l.* 10*s.*; (11.) chattels, trinkets and books; (12.) lottery bonds valued at 22*l.* 16*s.*; (13.) three freehold cottages situate at Westbury, Sherborne, Dorset, valued at about 600*l.*, subject so far as the same remained on foot at the death of the testator to a mortgage for 400*l.*

in favour of the settlement made on the marriage of the testator and his wife ; (14.) current rent of the same cottages ; (15.) testator's interest under the will (not yet proved) of his wife, who died in November, 1926, consisting of (*a*) an appointment in his favour of the funds comprised in their marriage settlement, which consisted of the mortgage moneys referred to in item (13.) if and so far as such mortgage was still on foot at the death, and a charge on certain lands in the Irish Free State, and (*b*) a sum of 40*l.* 9*s.* 3*d.* in the Cork Savings Bank, being the residue of the free estate of the testator's wife and (16.) 775*l.*, the balance of sum of 800*l.* secured by way of mortgage on the land and buildings thereon called the Masonic Hall, Yeovil, and arrears of interest.

On January 27, 1928, Cabell applied by motion in the Probate Division for a grant to him of administration with the will annexed, which was opposed by two of the next of kin. On February 14, 1928, the President held (1) that the motion failed on the ground that Cabell was not the residuary legatee or devisee and that the next of kin were entitled to the grant. He also held on the construction of the will that Cabell took the whole of the testator's estate, except the equity of redemption (item (13.)) and the furniture (item (9.)).

From this decision both Cabell and the next of kin appealed.

On June 5, 1928, the appeal was heard by the Court of Appeal (2), and an order was then made, by consent, varying the order of the President, by omitting therefrom his findings as to the property of the testator disposed of by his will and as to Cabell not being the residuary legatee and devisee, these matters being left, failing a settlement, to be determined by a judge of the Chancery Division.

On July 31, 1928, letters of administration, with the will annexed, were granted to two of the next of kin, the gross value of the estate in Great Britain being sworn at 6939*l.* 12*s.* 10*d.*

On November 12, 1928, the present summons was taken out in the Chancery Division by the two administrators

(1) [1928] P. 128. (2) [1928] P. 178.

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to determine the questions arising on the construction of the will.

On February 27, 1929, the summons was heard by Clauson J., who decided (following the decision of the President) that the gift of "all my money" passed the whole estate, including stocks and shares, excepting only real estate and personal chattels (including furniture and jewellery).

Cabell appealed, claiming in addition to be entitled to the furniture.

There was also a cross-appeal by one of the next of kin claiming that Cabell took only the cash in the house and in the bank.

The appeal was heard on June 6 and 7, 1929.

A. Grant K.C. and *L. W. Byrne* for Cabell. It is submitted that the word "money" in this will is used in a popular and colloquial sense, and means the whole of the personal estate.

There are three classes of cases which deal with the construction of the word "money."

1. Where a gift of "money" has been held to pass all the personal estate. In *In re Cadogan* (1), where the gift was, "I leave one-half of the money of which I am possessed," it was held that in construing a will no absolute technical meaning should be given to such a word as "money," the meaning of which must depend on the context, if any, and such surrounding circumstances as the Court can take into consideration. That case is very like the present.

[RUSSELL L.J. The judge there relied on the surrounding circumstances.]

Prichard v. *Prichard* (2) and *In the Goods of Bramley* (3) also show that there is no absolute technical rule for the construction of the word "money."

2. Where you find a gift of the residue of money coupled with a direction to pay debts and legacies, a favourable construction will be given to the word "money": *Dowson* v. *Gaskoin.* (4)

3. Where, however, there is a gift of a certain part of the

(1) (1883) 25 Ch. D. 154.
(2) (1870) L. R. 11 Eq. 232.
(3) [1902] P. 106.
(4) (1837) 2 Keen, 14.

personal estate followed by a gift of "money," "money" will not include the residue of the personal estate: *Lowe* v. *Thomas.* (1)

In re Skillen (2) is an example of class 2. It was there held that on the true construction of the will standing alone the word "money" comprised the whole of the residuary personal estate.

[RUSSELL L.J. That was a very special case. I have a difficulty in seeing how the judge arrived at his conclusion.]

The principle is stated in *In re Mellor.* (3) The Court there relied on the direction to pay debts as extending the meaning of "money": see also *In re Emerson.* (4)

In *In re Taylor* (5), where the gift was of "the money I have and am entitled to now or at any future time," it was held that the residuary personal estate did not pass. That case is distinguishable on the ground that the gift in the present case is residuary.

In *In re Buller* (6) Stirling J. doubted *In re Cadogan.* (7)

Our contention is that if a word is found in a will which has on the one hand a popular meaning and on the other hand a technical meaning the Court, if satisfied that the word was used in its popular meaning, ought to give effect to that meaning.

[LORD HANWORTH M.R. In this will I find no guidance, except what the will says.]

Spens K.C. and *Charles Harman* for the next of kin and *Wilfrid Hunt* for the administrators were not called upon.

LORD HANWORTH M.R. This case raises an interesting point, and not the less so from the argument put forward and the examination of the cases. It is an appeal from Clauson J. The testator on March 21, 1927, made his will, and he died on April 21 of that year. He did not appoint any executors of his will. The question arose whether there should be a grant of administration with the will annexed,

(1) (1854) 5 D. M. & G. 315.
(2) [1916] 1 Ch. 518.
(3) [1929] 1 Ch. 446.
(4) (1929) 1 Ch. 128.
(5) [1923] 1 Ch. 99.
(6) (1896) 74 L. T. 406, 409.
(7) 25 Ch. D. 154.

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and a motion to determine that came before the President of the Probate, Divorce and Admiralty Division on January 27, 1928, judgment being reserved and given on February 14, 1928. (1) Persons interested in an intestacy opposed the motion, which was brought by Alfred G. Cabell, the universal legatee under the will, for a grant to him of administration with the will annexed, and the motion failed, the President deciding that the estate had not been wholly disposed of, and that the grant ought to be to two of the persons entitled on an intestacy in priority to a legatee. The President expressed an opinion as to the effect of the will, and the matter came before this Court on June 5, 1928, by way of appeal, when we determined that the right course was to allow the parties to go before a Chancery judge to have the effect of the will determined. (2) The case went before Clauson J., and he felt constrained to follow the decision of the President, and he gave no reasoned judgment himself. From his decision this appeal is taken.

The will is in the simplest form, and merely consists of the words "I leave all my money to Alfred George Cabell." Alfred George Cabell was a friend of the deceased, and had looked after him during a lengthy illness before his death. It is clear that he was a man to whom the testator was much indebted for the services rendered to him. The testator was a mercantile man, and was possessed of a considerable amount of property, and the case is not therefore one of an illiterate testator. Clauson J. made an order, the effect of which was that under the words in the will "all my money" there passed to Alfred George Cabell the whole estate, including stocks and shares, excepting only real estate, and personal chattels, including furniture and jewellery.

The estate consisted of 800*l.* outstanding on mortgage and the equity of redemption of three freehold cottages, and the right to receive under an appointment under a will a sum of 450*l.* secured thereon by mortgage. The personal chattels were the furniture in the testator's house. We have

(1) [1928] P. 128. (2) [1928] P. 178.

before us a schedule of the various items of the estate, and it shows that the testator also died possessed of: (1.) cash in the house 4*l.*; (2.) cash at the testator's solicitors, 1*l.* 13*s.* 4*d.*; (3.) an uncashed cheque for 5*l.* 5*s.* on Barclays Bank; and (4.) about 1600*l.* on current account at the testator's bank. Treating these four items as cash the total is about 1610*l.* The testator was also possessed of 500*l.* nominal 5 per cent. War Loan, some 4 per cent. inscribed Consolidated Stock, and shares in various companies not of large value. He also had certain chattels and books as well as furniture. Clauson J. decided that everything passed to Alfred George Cabell, except the real estate and personal chattels, including the furniture. Cabell appeals from that decision to this Court on the ground that the expression "all my money" means all the testator's personal estate, though he does not contend here that it includes the real estate. The cross-appeal by one of the next of kin asks that the declaration should be confined to such part of the estate only as consists of cash in the strict sense—namely, the four items (1.) to (4.) which I have mentioned, amounting to about 1600*l.*

The case can be put forward that this testator intended to make a will and not to die intestate, and it is said that he used the words "all my money" in the popular sense, as when a person says, "What did he do with his money?" "Who has got his money?" In conversation the word "money" was used to embrace all the possessions of which a man died possessed, and therefore it is said that it must here be interpreted in that sense. And it is said that here the word is not only "money," but the words, "all my money," which must be interpreted as all embracing; but it is admitted that the words would not pass the real estate. Therefore the question we have to determine is whether this Court is entitled to give these words "all my money" that wide interpretation. Mr. Grant was right in asserting that there is no absolute technical rule that the word "money" is to be confined to liquid assets. Money at a bank is treated as cash as being able to be taken advantage of immediately. It is not true that the Court is free to interpret the word "money" as it

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pleases, because there are a number of decisions as to what are the limits to the interpretation of the word.

The matter has been investigated quite recently in this Court in *In re Taylor.* (1) That case was an appeal from Peterson J., and the Court of Appeal treated his judgment as comprising an exhaustive catalogue of all the material cases on this point. Lord Sterndale M.R. said (2): "The authorities are very fully discussed by Peterson J. and I do not propose to repeat the discussion. I agree that they establish the proposition that the word 'money' when used in a will means money in its strict sense, unless there is a context which is sufficient to show that the testatrix used it in a more extended sense." Then he added: "There are also I think two other guides to the construction of the word. I agree with Sargant J. in *In re Skillen* (3), that a comparatively slight context will enlarge the strict meaning of the words." Lower down the page Lord Sterndale said: "I also think that when a will is obviously not drawn by a skilled lawyer, as is the case here, the words used may be looked at less strictly than in a case where it is so drawn." That judgment was supported by the other judges of the Court. Warrington L.J. said (4): "Now the only principle established by the authorities is, I think, correctly stated by the learned judge in the following words: '"Money" is to be treated in the strict sense unless there be a context which shows something to the contrary.' 'Money in the strict sense' means, as I understand, money actually in hand as cash, or at a bank on drawing account, and certainly does not include such items of property as in this case have been held to pass." Therefore the rule is that the word "money" when used in a will means money in the strict sense unless there is a context to show otherwise.

What is meant by context? An illustration of what is meant by the word is to be found in *Prichard* v. *Prichard.* (5) The testator in that case declared that the income arising

(1) [1923] 1 Ch. 99.
(2) Ibid. 105.
(3) [1916] 1 Ch. 518, 521.
(4) [1923] 1 Ch. 99, 108.
(5) L. R. 11 Eq. 232.

from his principal money should be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them, and his sisters were to have the care of his mother. At his death he left his wife and six children surviving him. His property consisted of two freehold houses and a freehold rentcharge; his personal property was 36,657*l.*, the value of his share in a partnership; 3860*l.*, the value of his share in a second partnership; household furniture valued at 2976*l.*; and cash at his bankers 239*l.*; therefore he left 40,000*l.* Was it possible to confine the words "principal money" to the 239*l.* or was it indicated by the context that that phrase ought not to be read in its strict sense, but was intended to embrace the provision for the support of his wife and children? And it was there held that the whole of the personal property passed, including leaseholds, but not the freeholds, illustrating thereby the effect of the context on the extent of the property under the words "principal money."

There is one other case to which I should refer, *In re Emerson* (1), before Tomlin J. In that case the testatrix at her death had no cash at her bank, but she owned certain investments, and had 2*l.* 17*s.* only in cash in her house. Under the terms of the will three legatees were given legacies amounting to 250*l.* and specific bequests were made of furniture. By a codicil the testatrix bequeathed to her adopted niece "the residue of money at the time of my death," and it was held that the word "money" carried the residuary personal estate. It is clear that the amount of the cash in the house there was negligible, and it is also clear that the context in that case had enabled the Court to say that the word "money" must have been used in a sense other than that of merely cash. In *Dowson* v. *Gaskoin* (2) a testatrix whose personal property consisted chiefly of stock after giving a number of pecuniary and specific legacies bequeathed "whatever remains of money" to the five children of E. D., and it was held that the latter bequest referred to her general personal estate.

(1) [1929] 1 Ch. 128. (2) 2 Keen, 14.

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But in the present case we have simply the words "all my money." Mr. Grant says that it would not be mere speculation to say that the testator by those words intended to give all his personal estate, but it appears to me that even if the rules laid down with regard to the interpretation of the word "money" allowed of that, it would be difficult to share that opinion or view, as there is no context here which would allow of it. The testator might have intended to deal with all his property or to have given his friend 1610*l.*, and to say everything goes to him is to form an opinion on speculation and not on the meaning of the words actually used. The rule is that the word "money" used in a will means money in the strict sense, unless the context shows that a different interpretation is warranted. Is there here such a context? While intending to give a substantial sum to his friend the testator no doubt was careless as to what happened to the rest of his estate. His central thought was to make provision for his friend. There is here no context to allow the interpretation of the words "all my money" in any other way than in the strict sense.

Following, therefore, the principles laid down in *In re Taylor* (1), what passes under this is the liquid assets of the testator's estate—namely, the items (1.) to (4.) I have mentioned. Therefore the appeal fails, and equally the cross-appeal must succeed. The order of Clauson J. will therefore be varied, and the order must be that what passes to Mr. Alfred George Cabell are the items (1.) to (4.)

LAWRENCE L.J. I agree. In *In re Taylor* (1) it was held by this Court that the word "money" when used in a will means money in the strict sense, unless there is some context to show that the testator intended to use the word in a more extended sense. We are bound by that decision, which was only reached after an exhaustive examination of the earlier cases. The only question therefore is whether there is any context here which enables the Court to give a more extended meaning to the word. The only surrounding circumstances which

(1) [1923] 1 Ch. 99.

can legitimately be taken into consideration here were that the legatee was a friend of the testator to whom the testator owed a debt of gratitude; that the testator had a brother and three sisters as well as some nephews and nieces, the children of deceased brothers; and that the testator at the date of the will had a substantial sum of money in the strict sense in addition to other items of property, which included an equity of redemption in a piece of freehold land. The money items consisted of money at his bank, money in his house and money with his solicitors. The will was a holograph will, and was drawn up without the assistance of a lawyer. It is the shortest will I have come across in my professional experience. Is there any context which would enable this Court to give to the word "money" in this will the extended meaning? The only context suggested is that the testator used the word "all." It is said that in this gift the emphasis is on that word, and the use of it shows that the testator intended to include the whole of his personal estate. In my judgment this contention is not well founded. The word "all" does not enlarge the meaning of the word "money" or affect the character of the gift, but merely refers to the quantum, which it was intended to cover; that is to say, it was used to show that the gift was to embrace all items of money in his possession at the time of his death.

The surrounding circumstances do not in any way help us to the conclusion that the testator has used the word "money" in the wider sense contended for. Our duty is to construe the will not according to what we think the testator may have intended but according to the true meaning of the words he has used.

RUSSELL L.J. I agree. We are, in this Court, bound by *In re Taylor* (1) to hold that the words in this will, "all my money," must be construed in their strict sense unless surrounding circumstances or the context enable us to give those words a different and more extended meaning. In my

(1) [1923] 1 Ch. 99.

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opinion there are in this case no such surrounding circumstances nor any such context.

Appeal dismissed.
Cross-appeal allowed.
Order varied.

Solicitors for the appellant: *Bartlett & Gregory, for Bartlett & Sons, Sherborne.*

Solicitors for the respondents: *Reynolds, Sons & Gorst.*

W. I. C.

EVE and MAUGHAM JJ. 1929 *March* 12.

In re UNITED BRITISH INSURANCE COMPANY, LIMITED, AND *In re* ASSURANCE COMPANIES ACT, 1909.

[1929. U. 012.]

Company—Insurance Company—Transfer to another Insurance Company of Life Assurance Business—Petition to obtain Sanction of Court to Agreement —Transfer of Liabilities—Release of transferring Company from Liability to Policy Holders—Payment out of Court of Deposit Money—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 2, 3, 13.

Where an assurance company having power under its memorandum of association to transfer its business or any part thereof to another company has agreed to transfer all its life business to another assurance company, and the proposed transfer has been sanctioned by the Court upon a petition presented under s. 13 of the Assurance Companies Act, 1909, and all statutory requirements in connection with the transfer have been duly complied with, the effect is that all liability of the transferring company towards its policy holders is completely discharged, and the Court can order payment out of the deposit money to the transferring company.

Empire Guarantee and Insurance Corporation, Ld., 1911 S. C. 1296 applied and followed.

PETITION.

The petition was presented by Arthur Wilson Warnsley and others, directors of the United British Insurance Company asking that the sanction of the Court be given, under s. 13 of the Assurance Companies Act, 1909, to an agreement dated January 4, 1929, and made between the United British Insurance Company (hereinafter called "the

company ") of the one part and the Royal Exchange Assurance (hereinafter called " the corporation ") of the other part for the transfer of the whole of the life assurance business carried on by the company to the corporation.

The company was incorporated on October 15, 1915, under the Companies (Consolidation) Act, 1908, as a company limited by shares, with the object of carrying on the business of an insurance and guarantee company, and undertaking all kinds of insurance and guarantee risks, including life assurance, fire insurance, accident insurance, marine insurance and all other business of the same class. By clause 21 of the memorandum of association the company was authorized to amalgamate or enter into partnership or any joint purse or profit sharing arrangement or co-operate in any way with any company firm or person carrying on or proposing to carry on any business within the objects of the company. By clause 27 the company had power to dispose of the undertaking, assets and property of the company or any part thereof for such consideration as might be thought fit. The capital of the company at the date of the petition was 600,000*l*. in 600,000 shares of 1*l*. each fully paid. The business of the company mainly consisted of fire insurance, motor and general accident insurance and marine insurance. It carried on other classes of business, including life assurance, on a much smaller scale. The life assurance business was carried on successfully, but being on a small scale, much less economically than in the case of companies carrying on a large business of the kind, and the life fund was charged with less than its due proportion of the general administration expenses and overhead charges of the company. The directors therefore decided to discontinue the life assurance business of the company and entered into negotiations for the transfer of its life business to the corporation, with the result that the agreement of January 4, 1929, was entered into. The agreement which was set out in a schedule to the petition provided that the company was to discontinue transacting life assurance business, and to transfer to the corporation all its business of the kind as existing on

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January 1, 1929. Such transfer was to include the goodwill of the company's life assurance business, and the investments representing its life assurance fund (except the sum of 21,180*l*. 5 per cent. War Loan representing the sum of 20,000*l*. deposited by the company in Court under the Assurance Companies Act, 1909 (1), before commencing life assurance business) and all other assets belonging to its life department. The liability under all the company's life assurance contracts was to be transferred to the life assurance fund of the corporation, and the company and its assets were to be discharged from all further liability thereunder. The corporation also agreed to discharge all other debts and liabilities of the company in connection with its life assurance business as shown in the balance sheet published on December 31, 1928. The future premiums on the life policies taken over were to be reduced. The agreement was conditional upon the transfer being sanctioned by the Court under s. 13 of the Assurance Companies Act.

The corporation was an amalgamation effected in 1854 of two corporations established by Royal Charter in 1720 and 1721 respectively by virtue of the Royal Exchange Assurance Consolidation Act, 1854. The corporation had a capital of 2,000,000*l*., of which 689,219*l*. was issued and paid up, and carried out successfully all classes of insurance business, including life assurance on a large scale. The last balance sheet and accounts of the corporation showed that its life assurance fund amounted to 6,987,405*l*. and its net premium income on life assurance to 756,367*l*.

(1) By the Assurance Companies Act, 1909:—

"Sect. 13 (1.). Where it is intended to amalgamate two or more assurance companies, or to transfer the assurance business of any class from one assurance company to another company, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement.

"(2.) The Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may sanction the arrangement if it is satisfied that no sufficient objection to the arrangement has been established.

. . . . . .

"(4.) No assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer, is sanctioned by the Court in accordance with this section."

Evidence was filed showing that the proposed transfer was an equitable arrangement and one for the benefit of both the company and the corporation.

Topham K.C. and *Gordon Brown* for the petitioners. A doubt has been suggested in some text books, and perhaps in one case, whether a transfer of this kind can be made on the terms that the liability of the transferring company is totally discharged. It is submitted that that is the object of s. 13, and that the liability can be discharged subject to the protection given by application to the Court: *In re European Assurance Society. Hort's* case. (1) In that case there was a provision in the deed of settlement enabling the company to transfer its liabilities to another company. The Life Assurance Companies Act, 1870, s. 14, enabled directors to present a petition to obtain the sanction of the Court to a transfer where the power already existed in the company. That and the subsequent Act of 1872 were superseded by the Assurance Companies Act, 1909. The decision of Chitty J. in *In re Sovereign Life Assurance Co.* (2) under the earlier Acts was that where the company had no power to transfer its business under its own constitution, the Act of 1870 did not give it any power to transfer. It is suggested in Stiebel on Companies, 2nd ed., vol. i., pp. 868, 869, that even where there is a power to transfer business, the Court cannot sanction a scheme which will release the old company, and the decision in *In re Life and Health Assurance Association* (3) is said to confirm the doubt. But that is distinguishable; there the sale was not by the company under its own powers, but by a liquidator selling the business as a going concern.

[EVE J. I do not think that case affects the matter.]

The point now raised came before the Scottish Court in *Empire Guarantee and Insurance Corporation* (4), and the Court held that the liability on the policies would be transferred from the old company to the new company. Lord Dunedin said that the whole statute would be quite futile if it

(1) (1875) 1 Ch. D. 307.
(2) (1889) 42 Ch. D. 540.
(3) [1910] 1 Ch. 458.
(4) 1911 S. C. 1296.

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was not impliedly to mean that when the transactions were within the powers of the company, and were sanctioned by the Court, the old company should be free. If it were otherwise what would be the use of the sanction of the Court ?

J. G. Strangman for the Royal Exchange Assurance supported the petition.

EVE J. I do not think there is any difficulty in making the order. I am not dealing here with the question whether or no the transferring company is acquiring a power to transfer by virtue of the statute, because it already possesses that power. It is part of the constitution of the company. That being so, all I have to see is that the requirements of the sections have been complied with and to express the opinion, which I do, following the decision in *Empire Guarantee and Insurance Corporation* (1) that the effect of the transfer is to relieve the transferring company from any continuing liability towards the policy holders. I think the matter is clearly settled by the Scottish decision, which commends itself to my mind as being in accordance with what the statute intended. The order will be made sanctioning the agreement as asked in the petition. The costs are provided for by the agreement.

H. L. L.

June 18. MAUGHAM J. The question was now raised whether, in view of the order of March 12, the Court could sanction the release and payment out of Court of the 20,000*l*. deposited by the company in Court under the Assurance Companies Act, 1909, before commencing life assurance business.

Topham K.C. and *Gordon Brown* for the petitioners. The difficulty with respect to the question now before the Court is that it depends upon how far the existing order of Eve J. sanctioning the settlement has had the effect of releasing the company, and the assets of the company, entirely from all

(1) 1911 S. C. 1296.

liability on the policies issued by the company. Having regard to the provisions of the Assurance Companies Act, 1909, it is possible there is some question about that. The section that bears upon the deposit is s. 2, and the material sub-section is sub-s. 4, which provides that: "Where a company carries on, or intends to carry on, assurance business of more than one class, a separate sum of twenty thousand pounds shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund . . . ." "Part of that fund" means here part of the life fund, which no longer exists. The question is whether, the deposit having once been made as a security for the life policy holders, it can be taken away from them without their consent.

Stafford Crossman for the Board of Trade. By virtue of s. 2, sub-s. 4, the sum in question here formed part of the life assurance fund. Sect. 3, sub-s. 2, provides that: "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class. . . . ." That being the position, what effect does s. 13 have upon it? Sect. 13 enables a company to transfer the assurance business of any class from one assurance company to another, and under sub-s. 2 the Court can sanction the arrangements. Eve J. having made the order of March 12, and having treated it as releasing this deposit from all liability to the policy holders, it seems to follow almost necessarily that the Court is now bound to make the order for payment out.

Topham K.C. replied.

MAUGHAM J. I have satisfied myself that the decision in *Empire Guarantee and Insurance Corporation* (1) is exactly in point, and I shall follow that decision. Accordingly I think that Eve J. having sanctioned this agreement, and

(1) 1911 S. C. 1296.

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there being the high authority of the Scottish Court to the effect that, as the result of the sanctioning, the policy holders have no longer any rights against the transferor company which has paid this sum to the account mentioned, there ought now, in the circumstances, to be an order that it shall be paid out of Court.

Solicitors: *Slaughter & May; Solicitor, Board of Trade.*

P. J. B.

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July 17, 18.

ATTORNEY-GENERAL *v.* SUNDERLAND CORPORATION. (1)

[1927. A. 2329.]

Local Authority—Land acquired for Purposes of the Public Health Acts—Land used for Street Widening and Public Gardens—Work carried out in accordance with Plan submitted to the Local Government Board—Public Gardens not open or dedicated to the Public—Proposal to use Part of Public Gardens for Purpose of Street Widening—Widening to be used as Parking Place for Motor Cars—Public Health Act, 1925 (15 & 16 *Geo.* 5, *c.* 71), *s.* 68, *sub-s.* 1.

A local authority bought land in 1896 for the purposes of: (1.) street widening; (2.) making new streets; (3.) providing public walks and pleasure gardens. The land was conveyed to the local authority for the purposes authorized by the Public Health Acts. A plan and specifications were submitted to the Local Government Board, and subsequently the scheme was carried out in accordance with the plan and specifications. The pleasure gardens were surrounded by railings, and were not dedicated or open to the public. In 1927 the local authority resolved to utilize one of the pleasure grounds for the purpose of street widening and providing a parking place for motor cars. Objections were raised by some of the occupiers of adjoining premises, and an action was brought to restrain the local authority from carrying out their resolution:—

Held, that as one of the purposes for which the land was acquired was street widening, the local authority was not acting ultra vires in using part of the pleasure gardens for that purpose.

Held, further, that where land may be lawfully applied for the purpose of street widening, a local authority can, pursuant to its powers under s. 68, sub-s. 1, of the Public Health Act, 1925, use it as a parking place for motor cars.

IN this action the plaintiff, on the relation of certain occupiers of premises abutting on the land in question, asked

(1) Affirmed on Appeal, October 18, 1929.

for a declaration that the defendants were not entitled to make or provide or to cause or permit to be made or provided a parking place for motor cars on any part of a piece of land purchased by the defendants in 1896, and the plaintiff also asked for an injunction to restrain the defendants from making or allowing to be made a parking place on the land. The land in question was known as The Shrubbery, and before 1896 it was in a derelict condition.

The defendants had for some time contemplated purchasing The Shrubbery compulsorily, but ultimately they decided to purchase it by agreement. This was effected by a covenant to surrender, dated December 30, 1896, whereby the land was vested in trustees for the defendants to be conveyed to the defendants for the purposes authorized by the Public Health Acts and s. 7 of the Post Office Act, 1891 (54 & 55 Vict. c. 46).

The Shrubbery was purchased by the defendants for four purposes: (1.) to provide a site for a new post office; (2.) for the widening of adjoining streets; (3.) for the formation of new streets across the land; and (4.) the provision of public walks and pleasure gardens. A plan and specifications were submitted to the Local Government Board showing how it was proposed to use the land. An estimate was also presented to the Local Government Board showing how much of the money to be raised would be required for new streets, how much for the widening of existing streets, and how much for the provision of public walks and pleasure grounds. Eventually the defendants erected the post office, widened streets, made new streets, and constructed three ornamental gardens in accordance with the plan and specifications. These gardens were surrounded by high railings, and were not open or dedicated to the public.

On July 13, 1927, the defendants resolved to use one of the gardens for the widening of a street, and to convert that part into a parking place for motor cars in pursuance of their powers under s. 68, sub-s. 1, of the Public Health Act, 1925, which provides that: "Where for the purpose of relieving or preventing congestion of traffic it appears to the local

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authority to be necessary to provide within their district suitable parking places for vehicles, the local authority may provide such parking places in accordance with the provisions of this section, and for that purpose may—(c) by order authorize the use as a parking place of any part of a street within their district. . . . ." On August 10, 1927, a petition signed by about ninety persons and firms, owners or occupiers of premises adjoining, protesting against the use of any part of The Shrubbery as a parking place, was presented to the defendants. By a letter dated August 11, 1927, the defendants' town clerk informed one of the relators that the defendants had decided to adhere to their decision of July 13. This action was then commenced at the instance of the relators.

C. A. Bennett K.C. and *D. A. S. Cairns* for the plaintiff. The question in the present case is whether land acquired by the defendants thirty years ago for the purposes of the Public Health Acts and the Post Office Act, 1891, and since used as a site for a new post office and for a garden and shrubbery can now be turned into a parking place for motor cars under s. 68 of the Public Health Act, 1925. Land then acquired for one purpose cannot now be devoted to another purpose, but must be sold as surplus land under s. 175 of the Public Health Act, 1875 (38 & 39 Vict. c. 55): *Attorney-General* v. *Pontypridd Urban Council* (1); *Attorney-General* v. *Sunderland Corporation.* (2) There is no distinction in this respect between land acquired compulsorily and land acquired voluntarily.

Montgomery K.C. and *Wilfrid Hunt* for the defendants. The land in question here was conveyed to be used for the purposes of the Public Health Acts, or any of such purposes. The Acts are to be read together, and the purposes now include, by s. 68 of the Public Health Act, 1925, the provision of a parking place for motor cars and other vehicles. The expression "purposes authorized by the Public Health Acts" includes not only the existing but all future Public Health Acts.

(1) [1905] 2 Ch. 441. (2) (1876) 2 Ch. D. 634.

The defendants are not restricted to the use of any land in a particular way, because it has for years past been devoted to that purpose. The defendants have power to use the land for widening streets under s. 154 of the Public Health Act, 1875, and once the street is widened it may be used, under s. 68 of the Act of 1925, as a parking place.

Although the proposed parking place is chiefly intended for motor cars, it can be used for any horsed vehicle. The custom of parking market carts and vans prevailed extensively long before 1875, and the provision of a parking place was within the purview of the Act of 1875.

A parking place is ancillary to the ordinary use of a street.

Bennett K.C. in reply referred to *Attorney-General* v. *Hanwell Urban Council.* (1)

EVE J. In this case the Attorney-General, on the relation of certain occupiers of premises abutting on the land in question in this action, claims an injunction to restrain the defendant Corporation from utilizing for the purposes of a parking site for motor cars any part of a piece of land purchased by the Corporation in 1896. [His Lordship stated the facts, and continued:] The main argument on behalf of the relators is that from the time when the plan was submitted to the Local Government Board, or, at the latest from the date when the purchase was completed, the several parts of the southern portion of this rectangular space stood dedicated, for so long as they were the property of the Corporation, to such purposes only as were illustrated on the plan and provided for in the specification laid before the Board, and that if ever thereafter the Corporation should discontinue the particular user of any part of the land it would not be open to them to use that part for any other purpose, but the same would become in their hands surplus land to be sold pursuant to s. 175 of the Public Health Act, 1875. They contend, therefore, that if the Corporation proceed, as they threaten to proceed, to determine the user as a pleasure ground of a part of the land originally appropriated for and since

(1) [1900] 2 Ch. 377.

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maintained as pleasure ground they cannot use it as a parking place for cars but must dispose of it by sale. Is this the true position? The original scheme involved amongst other things the making of some new streets in connection with which certain statutory requirements had to be complied with, and if the present proposals involved any interference with those streets or any variation of what was then sanctioned in regard to those streets it might well be that the proposals of the Corporation could be shown to be ultra vires, but there is nothing of that kind in this dispute which has reference only to that part of the land not required for the new streets, that is to say the part available for street widening and pleasure grounds. At the time when the purchase was made the Corporation considered that the division they adopted between street widening and pleasure grounds was an appropriate and a satisfactory one, but in view of the new methods of locomotion which have come into being since 1896 and of the natural development of traffic in the city, they now consider that the time has arrived for a review of the division between these particular purposes, and that more of the land ought to be appropriated for the streets and less for the pleasure grounds. The first question I have to determine is whether there was in 1896 such a permanent appropriation of the portion now used as pleasure ground for that purpose, and that purpose alone, as precludes the Corporation from making the readjustment they now deem desirable. In this connection it is not immaterial to note a matter to which reference was made in *Attorney-General* v. *Teddington Urban Council* (1), that there has been no dedication of any part of the pleasure ground to the public; all that was done was to enclose three plots of the ground with unclimable iron railings without any means of access open to the public. They no doubt added to the amenities of the locality, but could not properly be said to be pleasure ground for the use of the public or in any sense dedicated to the public and I do not think I could properly hold that the particular appropriation was of a

(1) [1898] 1 Ch. 66.

permanent nature. I think the solution of this case depends upon the answer to be given to the question which Romer J. propounded at the beginning of his judgment in the *Teddington* case (1)—namely, whether any part of the land in question in this action, which was acquired by the defendants for street widening and pleasure ground purposes, will in the event of their discontinuing to use it as pleasure ground and using it for street widening purposes be land not required for the purpose for which it was acquired by them. I think it is very difficult to give anything but a negative reply to that question. The land was acquired for the two purposes, street widening and pleasure ground, and I cannot hold that it was acquired for one only of these purposes, seeing that it was left to the discretion of the Corporation to determine how much they would utilize for street widening and how much they would set aside for these ornamental enclosures. The use to which the Corporation now contemplate putting the plot—hitherto enclosed as pleasure ground—is one of the purposes for which it was originally acquired by them, and it is impossible for me to hold that the redistribution of the area between the purposes for which it was actually acquired involves a user outside of such purposes and constitutes an ultra vires act on the part of the Corporation. No doubt it is a disappointment to those who live in the neighbourhood that the street space should be increased and the amenities be lessened, but the relators are not claiming as parties entitled to enforce any trust created by the conveyance or otherwise ; they are suing as members of the public to restrain a corporate body from exceeding its powers ; the burden lies upon them to establish that this proposed user is in excess of the powers, and the only way in which that has been attempted to be done is by showing that this particular part of the land is not now required for the purposes for which it was originally acquired. The answer is that it was not acquired solely for the purpose for which it has hitherto been used, it was acquired for alternative purposes, and in my opinion there is nothing to prevent the Corporation

(1) [1898] 1 Ch. 66, 68.

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from discontinuing the maintenance of this enclosure and utilizing the vacant space for street widening. It cannot be said that the Corporation does not lawfully hold the land for that purpose.

It is argued that the proposed user is not really what is contemplated by street widening, it is the clearing of an open space for purposes which, although connected with traffic, do not really necessitate the widening of streets generally, or of this street in particular, for, notwithstanding that there is a general increase in the traffic of the town, there is no such obstruction in this particular street as to necessitate its being widened. I think that argument is answered by a reference to s. 68, sub-s. 1 (*c*), of the Public Health Act, 1925. Once this land is land which may be lawfully applied for the purposes of street widening, it is open to the Corporation to use it for parking purposes, and on the question of ultra vires the fact that the street widened is for the relief of traffic in general and not for that of the particular street cannot have any bearing. It does not, however, follow because the Court comes to the conclusion that this is not an ultra vires proposal that the proposal will ultimately be carried out. There are various safeguards interposed between the making of the proposal and its fulfilment, and I doubt not when the opportunity comes for those who oppose the formation of this particular park to formulate their objections due weight will be given to a variety of considerations to which I cannot attach any weight. For example, the presence of a parking place in the midst of houses occupied by persons engaged in professional and other pursuits requiring the maximum amount of quietude cannot be other than an undesirable innovation and one which must be an inconvenience and may be a nuisance. Moreover, it may well be regarded as somewhat unfair on those who live in a quiet part of the town where traffic is not impeded that their comparatively peaceful surroundings should be converted into a dumping ground for the relief of more congested parts of the city, and that they should have to put up with an inconvenience not born of anything existing in

their particular locality, but entirely due to the requirements of other parts. Those are all matters which I doubt not will be considered, as also I hope will be the question whether the existence of an open space with shrubs and shady trees in this particular locality is not a greater amenity, not merely to the residents but to the city at large, than any parking place can be. All these, however, are matters which really do not enter into, or ought not to enter into the determination of this short question, whether or no the conversion of this land into a widened street and its discontinuance as a pleasure ground involves an ultra vires act on the part of the Corporation? I cannot come to the conclusion that it does. In those circumstances the action fails and must be dismissed with the usual consequences.

Solicitors for the plaintiffs: *Ward, Bowie & Co., for C. T. Stockdale, Sunderland.*

Solicitors for the defendants: *Sharpe, Pritchard & Co., for H. Craven, Sunderland.*

P. J. B.

ROMER J.

1929

March 21, 22, 26.

KIRBY *v.* WILKINS.

[1928. K. 461.]

Company—Transfer of shares—Voluntary transfer to trustee for benefit of company—Voting power of trustee pending disposal of shares—Validity.

A partnership business was sold to a company for a sum of money which was satisfied by an allotment to the vendors of a number of fully paid shares in the company. It was subsequently discovered that, owing to mistake in the valuation, the partners had been overpaid by the company, and, in order to adjust the matter, two of them, on behalf of themselves and their co-vendors, voluntarily transferred to the chairman of the board of directors of the company 3000 shares upon trust to use or sell them for the benefit of the company. An action was commenced against the chairman of the board of directors and the company in which the plaintiffs claimed that he held the shares as trustee for the individual shareholders and in which they sought an injunction restraining him from voting, at any meeting of the company, as the holder of the shares :—

Held, (1.) that, on the evidence, the chairman of the board of directors held the shares, not for the benefit of the individual shareholders, but for the benefit of the company, and that he held them on trust, at his discretion, to sell them.

(2.) that the transfer did not offend against any principle laid down by any of the decided cases, and that the transaction was not made invalid by reason of the transfer having been made to a nominee on trusts which involved an obligation on the trustee to vote in respect of the shares as the company might from time to time direct.

Addison's Case (1870) L. R. 5 Ch. 294 and *In re Guardian Assurance Co.* [1917] 1 Ch. 431 considered.

Witness Action.

The following statement of the facts is substantially taken from his Lordship's judgment :—

A company known as Derby Paper Staining Co., Ld., appears to have purchased the business which it now carries on from four vendors, two Messrs. Kirby and two Messrs. Walker, who had been carrying on business in partnership together. The price paid by the company to the vendors for the business was approximately 16,000*l.*, which was satisfied by the allotment to the vendors of 16,000 fully paid shares in the company. After a time it was discovered by the company's auditor that the value of the stock in trade

sold by the vendors to the company had been arrived at by the vendors on an erroneous principle, and that in point of fact the company had paid 3000*l.* more for the business than the sum which would probably have been paid had the stock been valued on a proper basis. In those circumstances, the four vendors were desirous, as far as they were able to do so, of putting the matter right, and it was agreed by two of them, Mr. Kirby, sen., and Mr. Harold Walker, on behalf of themselves and their co-vendors, to place at the disposal of the company 3000 of the fully paid shares which had been allotted to them. In due course those 3000 shares were transferred by the vendors to the individual defendant in this action, who is himself a director, and, indeed, the chairman of the board of directors, upon trust. Now there was no claim which the company could enforce against the vendors, whether by way of damages or otherwise. No one suggests that there was any right to rescind the agreement for sale because of this miscalculation on the part of the vendors. Still less can any one suggest that there was any claim for damages against the vendors by virtue of any improper misrepresentation. The action of the vendors, therefore, in transferring these shares was a voluntary act on their part.

It is claimed by the plaintiffs in this action, one of them being one of the vendors, and the other a shareholder in the company, who was not one of the vendors, that the trusts upon which the defendant held these 3000 shares were trusts for the benefit of the individual shareholders in the company. On the other hand, it is alleged by the defendant and also by the company, which has, by amendment, been added as a defendant, that the trusts were not for the benefit of the shareholders individually, but for the benefit of the company itself.

The trusts upon which the individual defendant held the 3000 shares were stated by him at a general meeting of the company held on February 28, 1927, and he said this, after referring to the unsound method of stock-taking that had been adopted at the formation of the limited company, and to the

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opinion expressed about it by the auditors: "I am pleased to record that upon receipt of this opinion, my colleagues on the board" (those were the vendors) "expressed an anxiety to rectify as far as possible any loss through their errors of judgment in the past in this connection. As far as this could be ascertained it represented an amount of about 3000*l.*, and acting on your behalf I have accepted from the directors the surrender of 3000 shares that can be used or sold for the benefit of the company."

The plaintiffs also sought an injunction restraining the individual defendant from voting at any meeting of the company in respect of those shares.

Gover K.C. and *W. F. Swords* for the plaintiffs. The shares are not surrendered to the company. Such a surrender would be void: see *Addison's Case* (1); *Trevor* v. *Whitworth* (2); *Bellerby* v. *Rowland & Marwood's Steamship Co., Ld.* (3) The fact that a trustee holds them for the benefit of the company makes no difference to the principle. *In re Guardian Assurance Co.* (4) bears out this contention. A serious question involved in the present case is the manner in which the power of voting may be exercised in respect of these shares. The plaintiffs are entitled to take these proceedings in order to prevent the defendant from voting in respect of the shares. He is merely a trustee of the shares for the individual shareholders.

Topham K.C. and *G. P. Slade* for the defendants. There is no surrender of the shares, but the legal control of the shares is transferred to the chairman of the company to hold and deal with them, and anything which was realized in respect of them could be handed over by him to the company. That would only be for the benefit of the company: *Cree* v. *Somervail.* (5) The principles governing a transfer of this kind are stated in Buckley on the Companies Acts, 10th ed., p. 43. See also *Rowell* v. *John Rowell & Sons, Ld.* (6)

Swords in reply.

(1) L. R. 5 Ch. 294.
(2) (1887) 12 App. Cas. 409, 424.
(3) [1902] 2 Ch. 14.
(4) [1917] 1 Ch. 431, 442.
(5) (1879) 4 App. Cas. 648.
(6) [1912] 2 Ch. 609.

ROMER J. As to the facts of this case, I do not feel any doubt at all. The law applicable to those facts is not quite so easy. [His Lordship stated the facts as above set out, and after pointing out that at an earlier stage of the proceedings he had mentioned shortly the circumstances which had induced him to come to the conclusion on the evidence that the trusts upon which the individual defendant held the 3000 shares were not for the benefit of the individual shareholders, but for the benefit of the company itself, continued :] In my opinion, these shares were held by the defendant, Mr. Wilkins, upon trust for sale at such time and for such consideration as he in his discretion should think fit and pending a sale upon trust for the benefit of the company.

Those being the facts, it is contended by counsel for the plaintiffs, though this is a contention which can only avail the plaintiff Mr. Kirby, who was one of the original transferors, that, in the circumstances, there was a resulting trust of these 3000 shares for the vendors, on the ground that the transfer of these shares to a trustee for the company was an invalid transaction; that the trusts were invalid, and accordingly, that there was a resulting trust for the transferors. In support of that contention the plaintiffs rely upon the decision in *Trevor* v. *Whitworth*. (1) Now the grounds of the decision in *Trevor* v. *Whitworth* (1), which decided that a company may not purchase its own shares, are stated in this way in Buckley on the Companies Acts, 10th ed., p. 140: "The grounds of the decision in *Trevor* v. *Whitworth* (1), and the principles which it affirms may be summarized thus: (1.) Purchase by a company of its own shares is not forfeiture or surrender or anything like it. Forfeiture is valid, the Act recognises it: the company parts with no money, but resumes dominion of a share upon which something has been paid, and this because a further payment cannot be obtained. Surrender may be valid, e.g. where the company could forfeit and the member dispenses with the formalities. Each case of

(1) (1887) 12 App. Cas. 409, 424.

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surrender must be determined upon its merits. Where money is paid or consideration given by the company it is a purchase, and purchase is neither forfeiture nor surrender." The reference there to consideration given by the company as opposed to money paid by the company has reference, no doubt, to the decision of the Court of Appeal in *Bellerby's* case (1) in which the Court of Appeal pointed out that where shares are surrendered to a company which are not fully paid up, and in consideration of the company purporting to release the transferors or surrenderers from their further liability in respect of the shares, it is in effect the equivalent of a purchase by the company of its shares, and is invalid. To go on with the statement in Buckley on the Companies Acts the second principle is stated to be this: "(2.) The company cannot be a member of itself. (3.) The purchase of its own shares is a reduction of capital. The Act, in sanctioning reduction of capital under certain conditions and with certain restrictions, impliedly prohibits it unless the prescribed conditions and restrictions are observed. (4.) The Act impliedly prohibits the return of capital to members. The payment of capital to one shareholder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount to all the shareholders rateably. (5.) The transaction cannot be justified as 'incidental' to the company's objects, e.g. in a private company where it is desired to keep the shares in the hands of a few. To the creditor whose interests the Act intends to protect it makes no difference what the object of the purchase is." Now, if that be a true statement of the principles enunciated in the case of *Trevor* v. *Whitworth* (2), and in my view it is, adding perhaps thereto *Bellerby's* case (1), it is difficult to see which of those principles is infringed by the transfer that has been made in the present case. The company has not parted with one penny of its money, either in cash or money's worth. The company does not become a member of itself. The member of the company in respect of these 3000 shares is Mr. Wilkins, the defendant. It has not

(1) [1902] 2 Ch. 14. (2) 12 App. Cas. 409.

purchased its own shares, nor has there been a reduction of the company's capital. The capital issued, nominal, and paid up, remains precisely what it was before. It is said, however, that there are two authorities which indicate that a transfer of shares to a trustee for a company is as objectionable as a transfer of shares to the company itself. If money be paid for the transfer I agree. If money's worth be paid for the transfer I agree. If, as consideration for the transfer, the company purports to release the transferor from uncalled liabilities on the shares, I agree. But I know of no case that has decided that in a case such as the present one there is any objection to the transfer. I will now deal with the two authorities in question. The first is *Addison's Case* (1), of which the headnote is this: "A., being desirous of lending money to a company, accepted 100 shares of 5*l.* each, and paid 500*l.*, the whole amount of calls due thereon, upon condition that if he gave notice within a certain time his money should be repaid and the shares cancelled. He afterwards gave notice in pursuance of the agreement, and thereupon the money was repaid to him, and he executed a transfer of the shares to a nominee of the company, and his name was removed from the register of shareholders. Eight years afterwards the company was wound up. *Held* (affirming the decision of the Master of the Rolls), that A. was a contributory." There it will be observed that the company paid cash for the transfer of the shares, and though the money was paid in respect of a promise given at the time the shares were originally allotted to A., that of course could make no difference. In the course of his judgment, however, Giffard L.J. said this: "The company had no power to cancel shares, nor to buy up shares, but what Addison did, was to transfer these shares to a trustee for the company, that transfer could be of no avail; his liability is exactly the same as if his name had remained on the register till the winding-up commenced." Now I doubt whether the Lord Justice was directing his mind to a question anything like the one which I have to consider. He was considering the

(1) L. R. 5 Ch. 294, 297.

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liability of the transferor, and he was pointing out, and I think only intended to point out, that the transferor's liability was exactly the same as if his name had remained on the register. In the events that had happened A. had never paid for the shares, and his liability to do so could not be got rid of by a transfer to a nominee for the company. That consideration, I think, reconciles *Addison's Case* (1) with the dictum of Lord Hatherley in *Cree* v. *Somervail.* (2) There Lord Hatherley was dealing with the possibility of shares in a company becoming vested in a trustee for them without the company necessarily becoming a purchaser of them, and he said this: "As to their being trustees for the company, that might be perfectly legitimate and lawful, whatever view be taken of this case. I am not, as I have said, pronouncing any opinion as to what would have happened if the nature of the transaction had been different, if it had been for the purpose of merging the shares. But those shares might have become vested in a variety of ways in trustees for the company, without their being necessarily the purchasers of them. For instance, Mr. Thomson by his own will might, if he had thought fit, or if he had thought that such a course was desirable for his own purposes, have made a bequest of these very shares to certain persons as trustees for the company, or he might have made a bequest of them to the company itself, and the company might have found trustees to hold the shares as trustees for them, and to be answerable to third parties in respect of them." That, no doubt, was before *Trevor* v. *Whitworth* (3), but it is in no way inconsistent with what was said by Lord Watson in that case. Lord Watson said this: "Accordingly, when a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee, who is entered in the register, and holds the shares as trustee for the company, which undertakes to indemnify him from future calls. In that case, if the company goes into liquidation before its capital is fully paid up, the

(1) L. R. 5 Ch. 294. (2) 4 App. Cas. 648, 661.
(3) 12 App. Cas. 409, 424.

trustee is liable personally as a contributory for the amount then unpaid; but the amount withdrawn is never restored, and calls made upon the shares whilst the company is a going concern bring no addition to its capital." Now, if he had thought that in such a case a transfer of shares on which there was a liability to a trustee for the company was a nullity, he would not have said that the trustee is liable personally as a contributory for the amount unpaid. It seems to me that he contemplated that where the company had not paid cash for shares, or purported in consideration of the transfer to a nominee to liberate the transferor from liability, there was no objection to a transfer of such shares to a nominee for the company, inasmuch as the nominee himself would be liable for the shares. It may be, however, and I think that in Buckley on the Companies Acts the cases I have referred to are treated as authority for this, that although a transfer of partly paid shares to a nominee of the company leaves the transferor liable, because the company cannot purchase its own shares, yet in the case last put the transferee may himself be made liable. On the other hand I cannot find in *Addison's Case* (1) any clear authority for the proposition that in the case of a transfer of fully paid shares to a company without any consideration moving from the company, the transfer is invalid.

The other authority on which the plaintiff relied is a passage in the judgment of Younger J. in the *Guardian Assurance Co. Case.* (2) In that case Younger J. was asked to sanction a scheme of arrangement come to between the Guardian Assurance Company and its shareholders, and it was a case in which the scheme provided that the shareholders in the Guardian Assurance Company should make over certain proportions of their shares to another company called the Reliance Company, or to the shareholders in that other company, and the transfer of those shares was in effect to be part of the consideration paid by the Guardian Company for the acquisition of the business of the Reliance, or for the

(1) L. R. 5 Ch. 294. (2) 1917] 1 Ch. 431 442.

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acquisition of, I think it was, 80 per cent. of the shares in the Reliance Company. Younger J. thought that, although the scheme was advantageous, it was not an arrangement within the meaning of s. 120 of the Companies (Consolidation) Act, 1908, because there was no kind of dispute or difficulty involved that required to be resolved by a compromise or arrangement. But he did say this, apart from that objection to the petition: "It is, I think, possible to read this present scheme as one which in fact requires, or at least permits, a surrender of shares to the company in circumstances which would not justify a forfeiture, and such a transaction is ultra vires the company: see *Bellerby* v. *Rowland & Marwood's Steam Ship Co.*" (1) In point of fact, I doubt whether the *Bellerby* case (1) decided anything quite so wide as that, as is pointed out by Warrington J. in a later case of *Rowell* v. *John Rowell & Sons, Ld.* (2) Then he goes on: "It is of course true that the shares of the members taken here are, so far as words go, to be transferred by direction of the company and not surrendered to the company. But the transferee need not be the shareholder in the Reliance Company who is ultimately to get the shares; he may be, and presumably in most cases will be, a nominee or trustee for the Guardian Company pending the ascertainment of the ultimate transferee. If so, the transfer would for the time be nothing but a surrender." With great respect to the learned judge, I cannot myself see how the transaction would be a surrender. If the shares remain in the names of a nominee for the company, the shares have not been surrendered. If the company paid money for that transfer, then no doubt it would be trafficking in the shares of the company, and that would be invalid. Younger J. goes on as follows: "I recognise, however, that this objection to the scheme may, for the reason just suggested, not be open. I proceed, therefore, to the other, which, on the authorities is less open to doubt." The matter went to the Court of Appeal, and the Court of Appeal came to the conclusion that the scheme of arrangement was one within

(1) [1902] 2 Ch. 14. (2) [1912] 2 Ch. 609.

the terms of s. 120 of the Act, and they sanctioned it. They did not in terms deal with this clause relating to the transfer of shares. They did not express any view about it, but, inasmuch as they sanctioned the scheme, it must be, I think, taken that the Court of Appeal did not see any difficulty arising from the transfer such as was felt by Younger J.

In my opinion, this transfer of shares does not offend against any principle which has been laid down by any of the decided cases, nor, so far as I have been able to ascertain, any principle to be deduced from a consideration of the Companies Acts. I do, however, realize this difficulty, and it is one which gives pause for consideration. The defendant, Mr. Wilkins, was proposing, pending a sale of these shares, to exercise his voting power in respect of them in a way that did not commend itself to the plaintiffs in this action, and it is said that, assuming a transfer such as I have to deal with in the present case is otherwise unobjectionable, the effect of the transfer cannot be that the company obtains a power of voting through its nominee in respect of these shares. As I have already pointed out, one of the principles established in the cases is that a company cannot be a member of itself, but the company does not become a member of itself merely because a trustee of certain shares votes in respect of those shares as may be from time to time directed by the company. Nor can I see any reason why shares should not be held upon trust that the holder of the shares shall exercise his voting power as the company may from time to time direct. Supposing these four vendors, instead of transferring their shares, had agreed with the company that they would at all times exercise their voting power in respect of those shares as the company might from time to time direct. What is there in principle to render such an arrangement invalid? I confess that I can see none, and if such an arrangement between the four vendors and the company would not have been invalid, it cannot be invalid for the four vendors to transfer their shares to a nominee on trusts which involve an obligation on the trustee to vote in respect of the shares as the company

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may from time to time direct. It does not appear to me, therefore, that the fact that the company can control the voting power in respect of these shares is an objection to the validity of the transfer.

It is then said, however, that in any case the defendant ought not to have exercised his voting power in respect of the shares without the direction of the company. I do not think that that contention is sound. Where a shareholder holds shares as a bare trustee for a third person, he is no doubt obliged to exercise his voting power in the way that the cestui que trust desires, but unless and until the cestui que trust has indicated his wish as to the way in which the voting power should be exercised, there is no reason why the nominee should not exercise the voting power vested in him as a trustee. He holds that voting power upon trust, but, unless and until the cestui que trust intervenes, he must exercise it according to his discretion in the best interests of his cestui que trust. Now here I do not know that the company ever actually intervened, either through its board of directors, or by means of the general meeting of its shareholders in the sense of giving any direction to Mr. Wilkins as to how he should vote in respect of these shares, and that being so, unless and until he received any such direction, he was in my opinion justified in voting in respect of them as his conscience dictated in the interests of the company. In point of fact, Mr. Wilkins says that he does not intend in future to exercise this voting power except as he may be from time to time directed, and having regard to the very great difference of opinion which apparently exists in this company between one class of shareholder and another, I think he is very wise in coming to that conclusion. However that may be, it seems to me that in this action which is brought for the purpose of obtaining a declaration that Mr. Wilkins holds the 3000 shares on trust for the individual shareholders, and therefore on trust as regards certain of the shares for the plaintiffs themselves, and which asks for an injunction to restrain Mr. Wilkins from voting in respect of the portion of those shares except as the

plaintiffs may direct, the plaintiffs fail, and the action must be dismissed.

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KIRBY v. WILKINS.

Solicitors: *Braund & Hill, for Holbrook, Gretton & Richardson, Derby; Taylor, Jelf & Co., for Randolph Eddowes & Co., Derby.*

J. L. D.

In re BUND.

CRUIKSHANK *v.* WILLIS.

[1928. B. 2609.]

LUXMOORE J.
1929
April 19, 23; *May* 28; *June* 6.

Will—Codicil—Devise of Mansion House and Lands for successive Interests—Residuary Gift—Gift by Codicil of Mansion House and Lands to a new Devisee—Revocation by Codicil of Dispositions in Will—Heirlooms—Limitations of Realty and Personalty.

J. B., by his will, after appointing his sister C. W. and one J. S. executors and trustees thereof, and after giving certain legacies and exercising certain powers of appointment therein more particularly referred to, appointed and devised his mansion house, lands, cottages and hereditaments known as Wick Episcopi unto and to the use of his trustees upon trust after payment thereout as therein mentioned to pay the residue of the rents and income thereof to his sister the said C. W. for her life, and after her death upon the trusts therein mentioned. And after a further bequest of jewellery, plate and portraits so as to devolve as heirlooms with the said mansion house so far as the rules of law would permit by [*sic*] the person or persons for the time being entitled to the possession or receipt of the rents of the same mansion house, the testator thereby further gave, appointed, devised and bequeathed all the rest and residue of his real and personal estate unto and to the use of his trustees to such uses, upon such trusts, and for such ends intents and purposes as the Wick estate might under the trusts of his will for the time being be held so far as the rules of law would permit.

By a codicil dated August 4, 1927, after reciting that he was desirous of giving to his step-daughter M. C. (the plaintiff) a residence in England, the testator appointed devised and bequeathed to her for her life his said house Wick Episcopi and all the furniture, books, linen, plate and effects therein or belonging thereto and also the land he occupied therewith.

After the testator's death in 1928 the plaintiff M. C. took out an originating summons to determine (inter alia) the question whether the plaintiff was entitled for her life to the whole or any and if so what part of the rents, profits and income arising out of the residuary real and personal estate of the testator or of the income of the proceeds

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of sale thereof, or whether the defendant C. W. was entitled during her life to the said rents, profits and income or to some and what part thereof, or to whom the same were payable :—

Held, that the testator intended by the codicil only to give certain defined property to the plaintiff for her life for the definite purpose—namely, the provision of a house in England—mentioned in the codicil and that the codicil could only be read as interpolating into the will an interest in favour of the plaintiff in respect of the property specifically mentioned in the codicil; and that therefore the defendant C. W. was entitled during her life to the rents profits and income of the testator's residuary real and personal estate, and the proceeds of sale thereof.

Held, further, that the jewellery, plate, etc., included in the gift of heirlooms contained in the testator's will, other than such articles of plate as were in fact in the testator's mansion house at the date of his death, were in the events that had happened, to be enjoyed by the defendant C. W. during her life; and the excepted articles of plate were to be enjoyed by the plaintiff during her life.

The principle laid down in *Hearle* v. *Hicks* (1831) 1 Cl. & Fin. 20, 24 followed.

Martineau v. *Briggs* (1875) 23 W. R. 889 and *In re Towry's Settled Estate* (1889) 41 Ch. D. 64 discussed.

ORIGINATING SUMMONS.

By his will dated April 10, 1922, John William Bund Willis Bund (hereinafter called "the testator"), after appointing his sister (the first named defendant) Catherine Smyth Bund Willis and John Stallard (the second named defendant) executors and trustees thereof; and declaring that the expression "my trustees" should include as well as the persons appointed by name, any person or persons who might be appointed in their place, and also after directing the payment of his debts, funeral and testamentary expenses as therein mentioned and certain legacies; exercised a power of appointment in pursuance of a settlement made on his first marriage and in the will more particularly referred to. And the testator after further appointing certain freehold hereditaments in the counties of Cardigan and Carmarthen in pursuance of a power contained in an agreement for a settlement made on his second marriage and in the will more particularly mentioned, appointed and devised his mansion house, lands, cottages and hereditaments known as Wick Episcopi in the county of Worcester unto and to the use of his trustees upon trust after payment thereout as therein

mentioned to pay the residue of the said rents and income to his sister, the above named defendant Catherine S. B. Willis for her life, and after her death upon trust to allow his son Henry D. H. Willis Bund either to occupy or receive the rents and profits thereof or at the discretion of his trustees to pay him the net rents thereof until he should encumber the same as therein mentioned; and after his death in default of any male issue of his son to the use of his (the testator's) daughter Penelope Ann Willis Bund during her life for her separate use, and after her death, in default of any male issue of his daughter, to the use of the first and every other daughter of his said son successively in tail; and in default of such issue to the use of his (the testator's) grandson Henry H. Milward (the third defendant to the summons) for life. After the death of the said Henry H. Milward the residue of such rents and profits devised as above mentioned, was to go to the sons of the said Henry H. Milward in tail male, and in default of such issue to the use of the eldest son of his (the testator's) daughter Mary S. MacCarthy (the fourth defendant to the summons, Francis L. MacCarthy) for his life; and after his death to the use of the first and every other son of his (the testator's) said daughter as therein mentioned, and in default of such issue to his (the testator's) heirs in fee simple. Provided that any person becoming entitled under his will to the said estate should within six months after becoming entitled to the possession of the estate, assume the name and arms of Willis Bund or forfeit all estate and interest therein in default of compliance.

The testator further appointed and bequeathed all jewellery, plate and plated articles that belonged to the Willis or Bund family, including any such articles as might be at the Shire Hall, Worcester, or deposited at the Old Bank, Worcester, and also all plate, portraits and other articles which might have been presented to him, and also all pictures and miniatures, including those which belonged to either the Willis or Bund family, upon trust to permit the same to go and devolve with the said mansion house so far as the rules of law would permit by [*sic*] the person or persons who for the time

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being should be entitled to the possession or receipt of the rents of the same mansion house by virtue of his will, but so that the same effects should not vest absolutely in any person thereby made tenant in tail by purchase of the said house unless such person should attain the age of twenty-one years, but on the death of such tenant in tail by purchase the same effects should go and devolve and remain in the same manner as if they were freeholds of inheritance and had been thereby devised in settlement to the uses and upon the trusts thereinbefore declared of and concerning his said mansion house called Wick Episcopi. And he directed that as soon as conveniently might be after his death, the said trustees or the survivor of them or the executors or administrators of such survivor should cause schedules and inventories to be taken of the said jewellery and other articles, and two copies to be made thereof; and should sign each of the said copies, and keep one of them and leave the other at his said mansion house, and should from time to time cause the same copies to be signed by the person for the time being entitled in possession to the said mansion house under his will. And the testator further directed and appointed that all his books and papers should be held by his trustees in trust for the person who should for the time being be entitled under his will to the rents and profits of the Wick Episcopi estate; and that a person should be employed every third year to compare such books with the catalogue he had made of the same, with further provisions in the event of a certain number of books being found missing as therein more particularly mentioned.

And the testator thereby further gave, appointed, devised and bequeathed all the rest and residue of his real and personal estate unto and to the use of his trustees to such uses upon such trusts and for such ends intents and purposes as the Wick estate might under the trusts of his will for the time being be held so far as the rules of law would permit. And he gave his trustees absolute discretion to sell any part of his residuary estate, and to apply the proceeds thereof in payment off of the principal moneys at the time of his death

secured on any part of his real estate, and to invest the balance either in the purchase of real estate adjoining or near to the Wick Episcopi estate or which might be conveniently held or occupied therewith or in securities allowed by statute, and to pay the interest and income thereof unto the person or persons for the time being entitled under his will to the rents and profits of the Wick Episcopi estate.

The testator made a codicil dated August 4, 1927, to his said will, and thereby after reciting that his late wife's elder daughter, Mary E. T. Cruikshank (the plaintiff) had for some time past resided with him at his house Wick Episcopi in the parish of St. John in Bedwardine in the county of Worcester, and managed the same for him, and that he was desirous that after his death she should still have some house in England, made a devise and bequest in the following terms: "I therefore give, appoint, devise and bequeath to the said Mary E. T. Cruikshank my said house Wick Episcopi and all the furniture, books, linen, plate and effects therein or belonging thereto and also the land and gardens I occupy therewith and also the field adjoining . . . . to the said Mary E. T. Cruikshank for her life free from the debts . . . . of her present . . . . husband. . . . ."

The testator made a second codicil dated November 8, 1927, to his said will, and whereby after a direction to his trustees to make a certain payment therein more particularly mentioned, he confirmed his will.

The testator died on January 7, 1928, without having revoked or altered his will or codicils, and they were all duly proved in the District Probate Registry at Worcester on March 23, 1928, by both his executors, the first two named defendants. The testator's daughter Penelope Ann Willis Bund, mentioned in the will, died during her father's lifetime a spinster; and the son Henry D. H. Willis Bund (also mentioned in the will), though he survived his father, the testator, died on October 31, 1928, a bachelor.

Doubts having arisen as to the effect of the gifts contained in the will and first codicil, an originating summons was taken out by the plaintiff, Mrs. Mary E. T. Cruikshank, the

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step-daughter of the testator, for the determination (inter alia) of the following question: Whether upon the true construction of the will and codicils, the plaintiff was entitled during her life to the whole or any and if so what part of the rents profits and income arising out of the residuary real and personal estate of the testator or of the income of the proceeds of sale thereof, or whether the defendant Catherine Smyth Bund Willis was entitled during her life to the said rents profits and income or to some and what part thereof or to whom the same were payable.

A further question arising on the summons for determination is referred to in the judgment of the learned judge.

Charles Harman for the plaintiff. The first codicil has effected a change in the dispositions made by the will regarding the residuary real and personal estate; and the plaintiff is entitled to a proportionate part of the testator's Wick Episcopi estate. There must be a division of the rents and profits of the residuary estate. As to the effect of the revocation of a will by a codicil showing the intention of the testator, see the line of cases cited in Jarman on Wills, 6th ed., vol. i., p. 185, and *In re Towry's Settled Estate* (1); and see *Lord Carrington* v. *Payne*. (2) Where an intention is shown in the will to unite two estates, and the codicil mentions one only, the original intention is not obliterated: see remarks of the Master of the Rolls in *Lord Carrington* v. *Payne*. (2) This case can be distinguished from *Martineau* v. *Briggs* (3), where there was a real revocation, whereas in *Lord Carrington* v. *Payne* (2) there was none.

H. A. Hind for the defendants Catherine S. Bund Willis and John Stallard. The rules are really well settled as to superimposing a gift by codicil on a previous gift by will: see Hawkins on Wills, 3rd ed., pp. 9, 10; Jarman on Wills, 6th ed., vol. i., p. 177; Theobald on Wills, 8th ed., p. 838. There is no clear intention here in the codicil to revoke; the Court ought not to supply words not in the codicil:

(1) 41 Ch. D. 64.

(2) (1800) 5 Ves. 404, 420, 421.

(3) 23 W. R. 889.

Martineau v. *Briggs* (1); and see *In re Percival.* (2) The testator's intentions should be regarded as to the reason for altering his will. There is a great difference between the codicil in the present case and that in *In re Towry's Settled Estate.* (3) It is submitted that it is evident that the testator did not intend the plaintiff to get a share in his residuary estate. *Martineau* v. *Briggs* (1) is relied on and covers this case, which is perhaps even stronger than the one in the Weekly Reporter.

A. Adams for the defendant H. H. Milward, who had the same interest as the defendant Catherine S. Bund Willis. This case is distinguishable from *In re Towry's Settled Estate.* (3) The case of *Beauclerk* v. *Mead* (4) is very like the present one: see Theobald on Wills, 8th ed., p. 838, and *In re Gibson's Trusts.* (5)

W. M. Hunt for the defendant F. MacCarthy.

Cur. adv. vult.

June 6. LUXMOORE J. This is an originating summons which raises questions of construction and administration under the will and codicils of the testator, Mr. John William Bund Willis Bund. The first question raised is as to the destination, during the lifetime of the plaintiff—who is a step-daughter of the testator—of the rents, profits and income arising from the testator's residuary real and personal estate or of the income of the proceeds of sale thereof. Is the whole or any and what part of such rents, profits and income payable to the plaintiff or to the defendant Catherine Smyth Bund Willis (who is a sister of the testator), or to both of them in some and what proportions? The second question which has been or is to be added by way of amendment relates to the title to certain jewellery, plate and pictures which are directed by the testator's will to devolve as heirlooms. Do such heirlooms or any and which of them pass during the plaintiff's life to the plaintiff or to the defendant Catherine Smyth Bund Willis, or to any and what other person? There are other questions raised by the summons, but they do not arise so far as this judgment is concerned.

(1) 23 W. R. 889, 891.
(2) (1888) 59 L. T. 21.
(3) 41 Ch. D. 64.
(4) (1741) 2 Atk. 167.
(5) (1861) 2 J. & H. 656, 670.

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The first and second questions arise in this way [his Lordship stated the facts as substantially set out above :] The defendant Henry Harding Milward, the next in succession as life tenant, after the defendant Catherine S. B. Willis, is at present a bachelor and, subject to his marriage and birth of issue of such marriage, the next in succession to the settled property, is the eldest son of the testator's daughter, Mary Susanah MacCarthy—namely, the defendant Francis Leader MacCarthy. He takes (subject to the preceding interests) a life interest, and as this is followed by a devise to the use of the first and every other son of the testator's said daughter, Mrs. MacCarthy, successively in remainder one after another in tail male, it seems that at the present time the defendant Francis Leader MacCarthy is the first tenant in tail in existence. The ultimate remainder is to the testator's heirs in fee simple.

No difficulty arises so far as the devolution of the Wick Episcopi estate and the residuary real and personal estate under the will is concerned, for it is plain that if the will had stood alone, the testator's sister, Catherine Smyth Bund Willis, would get both for her life. The difficulty is caused by a codicil which the testator made on August 4, 1927. The codicil begins with a recital : " Whereas my late wife, Mary Elizabeth Willis Bund's elder daughter, Mary Elizabeth Thackeray Cruikshank "— that is the plaintiff —" the wife of James Cruikshank now residing in the United States of America, has for some time past resided with me at my house Wick Episcopi in the Parish of St. John in Bedwardine in the County of Worcester; and managed the same for me, and I am desirous that after my death she shall still have some house in England; I therefore give, appoint, devise and bequeath to the said Mary Elizabeth Thackeray Cruikshank, my said house Wick Episcopi, and all the furniture, books, linen, plate and effects therein or belonging thereto; and also the land and gardens I occupy therewith; and also the field adjoining, known as the Front Meadow, now occupied by H. E. Powell of Upper Wick as tenant thereof from year to year, to the said Mary Elizabeth Thackeray Cruikshank

for her life, free from the debts, control or engagements of her present or any future husband she may marry, she keeping the premises in good tenantable order and repair, and the buildings insured against loss or damage by fire in the names of my trustees and in such sum as they may think proper." This codicil, it is to be observed, contains no express revocation of anything contained in the will, but it clearly revokes some part at any rate of the dispositions made by the will, because it in fact directs that property disposed of by the will is to go in a manner which is contrary to such dispositions. Under the will the Wick Episcopi estate—which is there defined as "the mansion house, land, cottages and hereditaments, called or known as Wick Episcopi in the County of Worcester"—is devised to trustees upon trust to pay the residue of the rents and profits thereof, after making certain payments, to the several persons named in succession; and the rest and residue of his real and personal estate is given to his trustees "to such uses, upon such trusts and for such intents and purposes as the Wick Estate"—this obviously means the Wick Episcopi estate—may under the trusts of his will for the time being be held so far as the rules of law will permit. The codicil provides that the mansion house of Wick Episcopi and certain defined parts of the Wick Episcopi estate, but not all of it, and certain other items of property specifically bequeathed by the will, are to go to the plaintiff for her life, and the testator states the reasons for this provision in a recital to the codicil. He there states his desire to provide a home for his step-daughter in England. I have already read the words of the recital and I need not read them again.

It is true that taking the will and codicil together, the joint effect of the two documents is to provide that the testator's sister gets a part only of the property, which is described in the will as the Wick Episcopi estate (admittedly the less valuable part), while the plaintiff gets the rest of that estate, including the mansion house and certain specified fields constituting the more valuable part. Mr. Harman, who appears for the plaintiff, has argued that the result

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of this alteration is to effect a change in the disposition contained in the will of the testator's residuary real and personal estate. He claims that the residuary estate goes to the persons who under the testator's testamentary dispositions are together entitled to what is described as the Wick Episcopi estate, in proportion to the respective values of the parts of that estate taken by the plaintiff and the testator's sister respectively. Is this the correct view?

Now in considering the effect of a codicil upon the construction to be placed on a will, there are certain rules which must be observed. The most important rule is that in reading a will and codicil together, it is a general principle to construe the codicil so as to interfere as little as may be with the dispositions of the will. The principle is thus stated by Tindal C.J. in *Hearle* v. *Hicks* (1), where he says: "If such devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand." There is a second important rule and that is where personalty is directed to go by will upon the same trusts as realty, and the trusts of the realty are subsequently revoked or altered by a codicil, then if an intention can be gathered from the will and codicil to keep the two classes of property united, the limitations of the personalty will follow the limitations of the realty, as altered by the codicil: see *Lord Carrington* v. *Payne* (2); *In re Towry's Settled Estate* (3); but unless such an intention to keep the two classes of property together can be gathered from both documents, then the original gift in the will remains unaffected: *Beauclerk* v. *Mead* (4) —a case nearer to the present than any other cited in the course of the argument—and see also *Martineau* v. *Briggs*. (5)

(1) 1 Cl. & Fin. 20, 24.
(2) 5 Ves. 404.
(3) 41 Ch. D. 64.
(4) 2 Atk. 167.
(5) 23 W. R. 889.

The important thing to observe about this last mentioned rule is that the intention to keep the two classes together must appear from a consideration of both documents. It is not sufficient to find such an intention in the will alone.

In the present case a careful consideration of the two documents leads I think inevitably to the conclusion that all the testator was intending to do by the first codicil was to give certain defined property to the plaintiff for her life for the definite purpose which he mentions in the codicil—namely, to provide a house for her in England. The actual portions of the real estate to be enjoyed by her are carefully defined in the codicil, as also are (*a*) certain parts of his residuary personal estate, that is, furniture, linen and effects in his house Wick Episcopi, (*b*) certain parts of those chattels which the testator has directed to go as heirlooms, that is, the plate so far as it is in the mansion house at the testator's death, and (*c*) such of the books comprised in the specific gift of the testator's books as were also in the mansion house at the same date. The specific mention of particular parts of the several classes of property, appears to me to indicate that the testator intended his step-daughter to become entitled to the enjoyment during her life of the things expressly mentioned to the exclusion of the other items of property not so referred to; and to negative the contention that on the construction of the will and codicil read together, the testator intended the plaintiff to become entitled to an interest in any part of his residuary real and personal estate, other than in respect of the items specifically mentioned, and to point to the conclusion that all he intended her to have was the interest in the items of property specifically mentioned in the codicil itself and no more. In other words I think that the codicil can only be read as interpolating into the will an interest in favour of the plaintiff in respect of the property specifically mentioned in the codicil, and that, subject to this interpolation, the will stands and must be construed as if it remained the only testamentary document; indeed I am unable to find in the codicil anything to enable me to hold that on its true construction the testator still intended to

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keep the Wick Episcopi estate and his residuary real and personal estate united for all purposes. This really disposes of both questions, for although the will says that the heirlooms are to be enjoyed with the mansion house, the codicil on its true construction cannot be said to indicate any intention to keep the heirlooms and mansion house united when you find in the codicil an express gift of part only of the property included in the heirlooms as defined by the will, and no mention whatever of the rest of such property. It is said that the fact that the testator by a second codicil to his will which he made on November 8, 1927, and by which he confirms his will as altered by his first codicil, has some bearing on the case and necessitates the conclusion that the testator in fact intended the plaintiff to take the heirlooms, because she was also given the mansion house. In my view the confirmation in the second codicil cannot be construed, in the absence of any indication whatever, so as to alter the construction to be placed on the will and first codicil at the time of the execution of the first codicil.

It follows, therefore, that the first question in the summons must be answered by a declaration that on the true construction of the will and codicils the defendant Catherine Smyth Bund Willis is entitled during her life to the rents, profits and income of the testator's residuary real and personal estate, and the proceeds of sale thereof; and the second question by a declaration that on the true construction of the will and codicils the jewellery, plate and other articles included in the gift of heirlooms contained in the testator's will, other than such articles of plate as were in fact in the testator's mansion house at the date of his death, are in the events that have happened to be enjoyed by the defendant Catherine Smyth Bund Willis during her life, and that the excepted articles of plate are to be enjoyed by the plaintiff during her life.

Solicitors: *Withall & Withall; Hanhart & Co., for John Stallard, Worcester; Sydney T. James, for Coulter Hancock & Thrall, Truro.*

A. R. T.

END OF VOL. II. AND OF CHANCERY SERIES FOR 1929.

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